Supreme Court, U.S.
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No. 96-

In The

Supreme Court of the United States

October Term, 1995

HAMPTON TREE FARMS, INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

First Question

If a United States district court has jurisdiction of an action by a contractor against the Government relating to a contract subject to the Contract Disputes Act, does the Act deprive the district court of jurisdiction over the Government's counterclaims arising out of the contract?

Second Question

Does the six-year statute of limitations for contract actions brought by the Government not run during the period between when the Government realizes that there has been a breach of the contract and when a contracting officer issues a final decision on the Government's claim pursuant to the Contract Disputes Act?

Third Question

When computing the alternative one-year statute of limitations for contract actions brought by the Government, is a suit filed by a contractor in the Court of Federal Claims seeking review of a contracting officer's final decision an "administrative proceeding" so that the Government will have one year after a final decision is rendered in such suit to commence its action against the contractor; and, if such a suit would be an "administrative proceeding" if properly filed, does the filing of such a proceeding still toll the statute of limitations if the proceeding is ultimately dismissed for lack of jurisdiction?

PARTIES TO THIS PROCEEDING

Petitioner is Hampton Tree Farms, Inc., an Oregon corporation. All stock of Hampton Tree Farms, Inc. is owned by Hampton Resources, Inc., an Oregon corporation, all of whose stock is owned by Hampton Investment Company, an Oregon corporation.

Respondent is the United States of America.

The United States commenced two independent actions in the United States District Court for the District of Oregon, *U.S. v. Hampton Tree Farms, Inc.* (CV-93-00936-HJF) and *U.S. v. Suntip Co.* (CV-93-00681-REJ). The District Court granted summary judgment in favor of the defendant in each case, and the United States appealed. After each case was briefed, the appeals were consolidated by the Ninth Circuit for oral argument.

Suntip Co. has elected not to join in this petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Hampton Tree Farms, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit decided May 6, 1996.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 82 F.3d 1468 (9th Cir. 1996) and is reprinted in Appendix A.

The unreported opinion of the United States District Court for the District of Oregon dated December 15, 1993 is reprinted in Appendix B.

The opinion of the District Court dated August 11, 1994 is reported at 860 F.Supp. 741 (D.Or. 1994) and is reprinted in Appendix C.

The judgment of the District Court entered on August 11, 1994 is reprinted in Appendix D.

The order of the Ninth Circuit filed July 10, 1996 denying the petition for rehearing is reprinted in Appendix E.

JURISDICTION

The judgment of the Ninth Circuit for which review is sought is dated May 6, 1996. The order of the Ninth Circuit denying petitioner's timely petition for rehearing and suggestion for rehearing in banc is dated July 10, 1996. This petition is filed within 90 days after that last

date and is timely under Rule 13 of the Rules of the Supreme Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves the Contract Disputes Act, 41 U.S.C. §§ 601-613, which is reprinted in Appendix F;[1] Rule 13 of the Federal Rules of Civil Procedure, which is reprinted in Appendix G; and the statute of limitations applicable to contract actions brought by the United States, 28 U.S.C. §§ 2415-16, which is reprinted in Appendix H.

STATEMENT OF THE CASE

In June 1985, Hampton Tree Farms, Inc. ("Hampton") filed an action in the United States District Court for the District of Oregon (the "District Court") against the United States (the "Government") seeking a declaration that Hampton was entitled under the Government's Multi-Sale Extension Program to five-year extensions of the expiration dates of 11 timber sale contracts with the Forest Service. Although Hampton had filed its application for the extensions after the deadline set therefor by the Forest Service, its application was timely under the

[1] The version of the CDA reprinted in Appendix F reflects amendments made in 1982 (Pub.L. No. 97-164). It does not incorporate amendments made in 1990 (Pub.L. No. 101-552), 1992 (Pub.L. No. 102-572) and 1994 (Pub.L. No. 103-355).

terms of an injunction issued by the District Court in an earlier case reviewed in *North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir.), *cert. denied*, 474 U.S. 931, 106 S.Ct. 265, 88 L.Ed.2d 271 (1985).

Hampton's action was permitted under the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 701-06, and the Declaratory Judgment Act (the "DJA"), 28 U.S.C. §§ 2201-02. As a claim permitted under the APA's waiver of sovereign immunity, the District Court had original jurisdiction under the federal question statute, 28 U.S.C. § 1331. *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 607 (D.C. Cir. 1992).

The contracts expired while Hampton's declaratory judgment action was pending in the District Court, and the Forest Service issued letters advising Hampton that each contract was in default and that Hampton would be notified when the Government's damages had been determined. Appraisals and resales of the affected timber then were conducted and contracting officers eventually issued "final decisions" under the Contract Disputes Act (the "CDA" or the "Act"), 41 U.S.C. §§ 601-613, stating that Hampton was liable to the Government for over $18 million in damages by reason of its breach of the contracts.

By amended and supplemental complaints filed in its declaratory judgment action, Hampton brought these developments to the attention of the District Court. The Government's answers to Hampton's amended and supplemental pleadings admitted that final decisions had been issued with respect to all the contracts. Although

Rule 13(a) of the Federal Rules of Civil Procedure provides that a defendant's answer shall state as a counterclaim any claim which at the time the defendant has against the plaintiff, "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim," the Government did not assert a counterclaim based on any of the alleged contract defaults.

The CDA provides that all claims relating to a contract covered by the Act shall be the subject of a decision by the contracting officer responsible for administering the contract. The Act further provides that such final decisions "shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless" the aggrieved contractor timely files a notice of appeal with the proper board of contract appeals or brings a suit seeking review of the decision in the Court of Federal Claims (the "CFC").[2] Hampton sought review of the contracting officers' decisions by timely commencing suits in the CFC.

The Government, contending that Hampton's declaratory judgment action in the District Court involved the same claims as were involved in the CFC suits, promptly moved to dismiss the CFC suits on the ground that 28 U.S.C. § 1500 deprived the court of subject matter jurisdiction. Section 1500 provides that the CFC shall not have jurisdiction of any claim "for or in respect to which" the plaintiff has a suit pending in any other court. The CFC

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[2] The Claims Court was renamed the "United States Court of Federal Claims" by the Court of Federal Claims Technical and Procedural Improvements Act of 1992. To avoid confusion, the current name is used throughout this petition.

did not immediately rule on the Government's motion, but stayed the suits pending the outcome of the District Court action.

In 1990, the District Court entered summary judgment declaring that Hampton was entitled to the contract extensions it sought. In late 1992, however, that judgment was reversed by the Ninth Circuit. Because the District Court in the *North Side* action had lacked subject matter jurisdiction, the Ninth Circuit held that the injunction issued by the District Court in that action was a nullity for all purposes and Hampton could not rely upon it to have extended the Forest Service's deadline for filing applications for contract extensions. *Hampton Tree Farms, Inc. v. Yeutter*, 956 F.2d 869 (9th Cir.), *cert. denied*, 506 U.S. 816, 113 S.Ct. 56, 121 L.Ed.2d 25 (1992).

Thereafter, the Government renewed its motion to dismiss the still pending CFC suits. Relying on *Keene Corp. v. U.S.*, 508 U.S. 200, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993), the CFC dismissed Hampton's suits in July 1993 for lack of jurisdiction.

By July 1993, more than six years had passed since the last of the contracts had expired without being performed, since the last notice of default had been sent to Hampton, and since contracting officers had issued final decisions with regard to three of the 11 contracts.

In connection with the passage of time, 28 U.S.C. § 2415(a) provides:

> "Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States * * * which is

> founded upon any contract * * * , shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later * * * ."

Thus, there are two limitation periods for contract actions brought by the Government: a six-year period that commences on accrual of the Government's right of action; and a one year period that accrues on the rendering of a final decision "in applicable administrative proceedings." Section 2416 lists four specific circumstances that toll the running of the statute of limitations, namely, the absence of the defendant from the United States; the exemption of the defendant from legal process because of infancy, etc.; the lack of knowledge on the part of the Government of "facts material to the right of action"; and war.

In August 1993, the Government commenced the present action in the District Court seeking judgment against Hampton in the amount of approximately $18 million, plus prejudgment interest, on account of the contract defaults that were the subject of the contracting officers' final decisions. Jurisdiction was based on 28 U.S.C. § 1345. According to the Government, Hampton was not entitled to a trial on the merits, for each of the final decisions was, pursuant to the CDA, "final and conclusive and not subject to review."

The District Court entered summary judgment in favor of Hampton. First, the court held that all but two of the Government's claims were barred by 28 U.S.C. §§ 2415-16, because the Government's complaint was not

brought within six years of when the Government determined the amount of its damages. *See* Appendix B. Second, the District Court held that the Government's remaining claims were barred by res judicata pursuant to Rule 13(a) of the Federal Rules of Civil Procedure, because they had not been pled as compulsory counterclaims in Hampton's earlier declaratory judgment action. *See* Appendix C.

On appeal by the Government, the Ninth Circuit reversed. *See* Appendix A. In its opinion, the court held that each of the Government's claims was subject to the CDA and that each claim did not accrue for purposes of the six-year statute of limitations until a contracting officer had issued a final decision on the claim.

Further, because the CFC lacked subject matter jurisdiction of Hampton's suits, the Ninth Circuit held that the timely commencement of those suits had not preserved Hampton's right to contest the merits of the Government's claims. But the court went on to hold that the suits were not a nullity for all purposes. The court concluded that the CFC suits were "administrative proceedings" for purposes of applying the one-year limitations period and that the Government's present action in the District Court was timely, even if some of the Government's claims were barred by the six-year statute of limitations, because the action had been commenced within one year of the dismissal of the CFC suits. In other words, while the commencement of the suits by Hampton was sufficient to toll the one-year statute of limitations, the commencement of the suits was not sufficient to prevent the contracting officers' decisions from becoming "final and conclusive and not subject to review."

Finally, the Ninth Circuit held that the Government's claims had not been compulsory counterclaims in Hampton's earlier declaratory judgment action in the District Court, because the CDA deprived the district courts of subject matter jurisdiction over all CDA claims. The court added that the Government's claims also were not "mature" for Rule 13 purposes when the Government filed its answers in Hampton's District Court action, because the contracting officers' decisions (even though the six-year statute of limitations was running on the underlying claims) were at that time still subject to review.

The Ninth Circuit's ruling allows the Government to collect millions of dollars in alleged contract damages without ever having to plead, much less prove, the merits of its claims in either the District Court or the CFC.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's decision presents the important question of what relevance, if any, the CDA has to Government contract disputes that are properly before the district courts pursuant to an independent waiver of sovereign immunity and grant of district court jurisdiction.

There is no doubt that Congress intended, by enacting the CDA, to centralize to some extent adjudication of Government contract disputes in contracting officers, boards of contract appeals, and the CFC. In doing so, however, Congress did not deprive the district courts of all jurisdiction over Government contract disputes. This

Court has observed that the CFC's jurisdiction is "exclusive" only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the CFC. *Bowen v. Massachusetts*, 487 U.S. 879, 910 n. 48, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988). Accordingly, to determine the extent to which the district courts have a continuing role in Government contract disputes requires examining, not just the CDA, but all that Congress has had to say on the subject.

Under the Tucker Act, 28 U.S.C. §§ 1346 and 1491, the Government has waived its sovereign immunity for certain types of claims by conferring jurisdiction on the CFC, and in certain cases on the district courts, to hear these claims. The CDA's only express limitation on district court jurisdiction is effected by its amendment of the Tucker Act to withdraw the district courts' concurrent jurisdiction over claims against the Government "founded upon * * * contract" for sums not exceeding $10,000 that would otherwise be subject to the CDA. *See* 28 U.S.C. § 1346(a)(2); *Licata v. U.S. Postal Service*, 33 F.3d 259, 264 n. 6 (3rd Cir. 1994).

But claims founded on statutory rights are not "founded upon a contract" and, therefore, are not covered by the Tucker Act's limitation of district court jurisdiction. *North Side Lumber Co., supra*, 753 F.2d at 1485. It also is clear that the CDA does not provide the exclusive basis for litigation of claims relating to Government contracts. Hampton's declaratory judgment action is one example of a Government contract dispute properly brought in the district courts pursuant to statutes other than the CDA. *See also, Quality Tooling, Inc. v. U.S.*, 47 F.3d 1569 (Fed. Cir. 1995) (district court in which contractor's

Chapter 11 case was pending had jurisdiction over contractor's contractual claims against the Government); *Wright v. U.S. Postal Service*, 29 F.3d 1426 (9th Cir. 1994) (Postal Reorganization Act gave district courts jurisdiction over subcontractors' actions to establish and foreclose equitable liens against the Postal Service); *In re Liberty Const.*, 9 F.3d 800 (9th Cir. 1993) (district court had jurisdiction under the Small Business Act over contract claims within the scope of the CDA asserted as cross claims against Government); and *U.S. v. Rockwell International Corp.*, 795 F.Supp. 1131 (N.D.Ga. 1992) (district court having jurisdiction over Government's action against defense contractor under Federal False Claims Act also had jurisdiction over Government's common law claims of unjust enrichment, payment under mistake of fact, and breach of contract).[3]

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[3] Recent Congressional enactments reinforce the view that Congress intended there to be concurrent jurisdiction to entertain Government contract disputes in the district courts and either the board of contract appeals or the CFC. Section 10 of the CDA, 41 U.S.C. § 609, was amended in 1994 to add a new subsection (f):

> "(1) Whenever an action involving an issue described in paragraph (2) is pending in a district court of the United States, the district court may request a board of contract appeals to provide the court with an advisory opinion on the matters of contract interpretation at issue." Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2354, 108 Stat. 3243, 3323 (1994).

The "issue described in paragraph (2)" is a CDA claim: "An issue referred to in paragraph (1) is any issue that could be the proper subject of a final decision of a contracting officer appealable under this Act." *Id.* (Continued)

Once a case is properly before a district court on a basis other than the CDA, the question arises whether any of the dispute resolution procedures mandated by the CDA apply.

In re Remington Rand Corp., 836 F.2d 825 (3rd Cir. 1988), was an action by a debtor for a declaratory judgment that the Government's claim for breach of contract had been discharged when the Government's proof of claim had not been timely filed before confirmation of the debtor's Chapter 11 reorganization plan. The court of appeals held that the Government had a claim under the Bankruptcy Code when the Government uncovered evidence of the contract breach, and not, as the Government contended, only after a contracting officer had issued a final decision under the CDA establishing the amount of the claim. In relevant part, the Third Circuit said:

> "In light of the statutory language and the legislative history, we conclude that the [Contract Disputes] Act creates no substantive contractual rights; rather, it assumes the existence of a traditional contractual cause of action. More importantly, the Act imposes the approval requirement of § 605(a) [i.e., the requirement of a contracting officer's final decision on a claim] as a procedural device intended to promote resolution of government contract disputes before resort to judicial process. * * * ." *Id.* at 831.

This new provision leaves little doubt that Congress understands and intended that district courts would be entertaining CDA claims. *Quality Tooling, Inc. v. U.S.*, *supra*, 47 F.3d at 1578.

In *Marine Coatings of Alabama, Inc. v. U.S.*, 932 F.2d 1370 (11th Cir. 1991), MCI, a ship repair subcontractor, filed a suit in admiralty against the Government to recover money for repair services performed on three naval vessels. Subject matter jurisdiction was based on the Suits in Admiralty Act ("SAA") and the Public Vessels Act ("PVA"). The district court granted summary judgment in favor of the Government, holding that the CDA applied to resolution of the claim and that MCI's failure to comply with the procedural requirements of the CDA barred recovery. The Eleventh Circuit reversed:

> "The CDA is only one of many statutes waiving sovereign immunity. The Federal Tort Claims Act ("FTCA") * * * the SAA, and PVA also waive immunity. The government's position appears to be that the CDA imposes a restrictive limitation on the scope of the SAA's and PVA's waiver of immunity. The district court also seems to have read such a restriction into the respective provisions. We see no reasonable justification for such a reading. To impose external limits on an express waiver of sovereign immunity would frustrate Congress's purpose in enacting the provisions. * * *
>
> "The FTCA and the CDA both waive immunity, but there is no need to apply either if another method of bringing suit is available. The Maritime Lien Act's provisions, coupled with the SAA and PVA read together, offer a means for plaintiffs to sue the government * * * in district court * * * ." *Id.* at 1377.

If *Remington Rand* and *Marine Coatings* were correctly decided, then the Ninth Circuit's decision in the present case is based on the legally incorrect premise that the

CDA provides the exclusive basis for litigation of claims relating to Government contracts. By basing its decision on that premise, the court ignored the other bases for such litigation, notwithstanding the rule that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

Had Hampton defaulted its contracts with the Forest Service without first seeking a declaratory judgment in the District Court, then the dispute doubtless would have followed the procedural course set by the CDA. Hampton, within the time limits prescribed by the CDA, would have initiated its challenges to the contracting officers' final decisions either by filing appeals with the board of contract appeals or by commencing suits with the CFC. Section 1500 would not have been a bar. Thereafter, the rules of procedure for determining the merits of the Government's claims would have been those of the board of contract appeals or of the CFC. The APA and the Federal Rules of Civil Procedure would have been irrelevant.

But Hampton's action was properly in the District Court under the APA's waiver of sovereign immunity, the DJA, and 28 U.S.C. § 1331. Under those circumstances, the CDA was irrelevant. Certainly, if the District Court's declaratory judgment in favor of Hampton had not been reversed on appeal, the Government could not now be contending that the contracting officers' decisions are, nevertheless, "final and conclusive and not subject to review," because Hampton had not successfully sought

administrative or judicial review of the decisions pursuant to the CDA.

Hampton's declaratory judgment action in the District Court was on a parallel, but different track than the track laid out by the CDA. Under the circumstances present in Hampton's action, the applicable rules of procedure were the Federal Rules of Civil Procedure, which govern procedure in the United States district courts in all suits of a civil nature. *Cf. General Marine Const. Corp. v. U.S.*, 738 F.Supp. 586, 590 (D.Mass. 1990) ("[O]nce a case is properly commenced as an admiralty matter in the District Court, [FRCP] 14(c) governs related claims even if the issues raised by these related claims, standing alone, would otherwise be subject to the CDA procedural scheme.").

2. The Ninth Circuit, by holding that the CDA deprives the district courts of jurisdiction over Government counterclaims otherwise deemed compulsory under Rule 13(a) of the Federal Rules of Civil Procedure, has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

The Government's claims in this action were compulsory counterclaims in Hampton's declaratory judgment action under the criteria set forth in Rule 13(a). By the time the Government filed its last pleading in the District Court action, final decisions stating the amount of each claim had been issued by contracting officers and, even by the Ninth Circuit's construction of the statute of limitations, the six-year limitation period was running. Nothing in the CDA requires the Government to hold off

filing an action to enforce a contracting officer's decision until the time has expired for the contractor to appeal. *See U.S. v. BLH, Inc.*, 773 F.2d 232 (8th Cir. 1985). The fact that Hampton's and the Government's respective claims arose out of the same transactions or occurrences was self-evident, for Hampton's claims were a defense to the Government's contractually based claims; if Hampton was entitled to contract extensions, the Government could not prevail on its claims for damages. *See Moore v. New York Cotton Exchange*, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926). Finally, the exception provided in Rule 13 for instances in which "at the time the action was commenced the claim was the subject of another pending action" did not apply, because the Government's claims were not the subject of another pending action when Hampton's action was commenced in 1985.

Accordingly, the only question here is whether the District Court had jurisdiction over the Government's counterclaims. In this regard, nothing in the CDA purports to limit the jurisdiction of the district courts over Government claims. The only limitations on the district courts' jurisdiction relate to jurisdiction over claims by contractors against the Government. As already noted above, those limitations did not bar Hampton's action.

When filing its complaint in the present action, the Government relied on 28 U.S.C. § 1345 as the basis for the district court's jurisdiction. That statute provides:

> "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States * * * ."

Section 1345 provides an independent basis for district court jurisdiction over Government counterclaims, even when the court does not have subject matter jurisdiction over the plaintiff's action. *Peerless Ins. Co. v. U.S.*, 674 F.Supp. 1202, 1205 (E.D.Va. 1987).

There is a fundamental contradiction in the proposition that the District Court lacked subject matter jurisdiction over the Government's counterclaims in Hampton's declaratory judgment action, when the same court had subject matter jurisdiction over the same claims when they were subsequently presented by the Government in this action.

In *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n. 1, 94 S.Ct. 2504, 41 L.Ed.2d 243 (1974), this Court said:

> "Rule 13(a), the compulsory counterclaim rule, requires a defendant to plead any counterclaim which 'arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.' * * * A counterclaim which is compulsory but is not brought is thereafter barred * * * .
>
> "If the counterclaim is compulsory, the federal court will have ancillary jurisdiction over it * * * ."[4]

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[4] 28 U.S.C. § 1367, part of the Judicial Improvements Act of 1990, codified under the name of "supplemental jurisdiction" the common law doctrine of ancillary jurisdiction.

Thus, the District Court had original jurisdiction over the Government's counterclaims pursuant to § 1345 as well as ancillary jurisdiction.

Rule 13 is a harsh rule, forcing parties to raise their claims at a time and place chosen by their opponents, or to lose them. *Martino v. McDonald's System, Inc.*, 598 F.2d 1079, 1082 (7th Cir.), *cert. denied*, 444 U.S. 966, 100 S.Ct. 455, 62 L.Ed.2d 379 (1979). But the rule serves an important purpose.

In *Southern Construction Co. v. U.S.*, 371 U.S. 57, 60, 83 S.Ct. 108, 9 L.Ed.2d 31 (1962), this Court explained that the compulsory counterclaim rule,

> " * * * was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters. The Rule was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint. * * * "

28 U.S.C. § 1500, pursuant to which Hampton's suits in the CFC were dismissed, serves a similar function as Rule 13 by barring duplicative lawsuits against the Government. *Keene Corporation, supra*, 124 L.Ed.2d at 127. Under § 1500, the CFC did not have jurisdiction of Hampton's suits filed pursuant to the CDA, for the very reason that the District Court already had jurisdiction pursuant to the APA, DJA, and 28 U.S.C. § 1331. Surely, the purpose of § 1500 is not to save the Government from ever having to prove the merits of its claims against Hampton. Clearly, the purpose of § 1500 is to save the Government from having to prove its claims twice, once in Hampton's

District Court action and a second time in Hampton's CFC suits. By virtue of § 1500, the District Court became the exclusive forum for resolving the parties' contract disputes. Rule 13 thereupon required the Government to plead its claims in the District Court, or waive them forever.

The District Court had jurisdiction of Hampton's action against the Government, because Congress had consented to the suit. Having consented to suit, the Government placed itself in the position of an ordinary litigant before the court, to whom the Federal Rules of Civil Procedure, including Rule 13, apply. *Mosseiler v. U.S.*, 158 F.2d 380, 382 (2nd Cir. 1946); *U.S. v. Eastport S.S. Corp.*, 255 F.2d 795, 801-802 (2nd Cir 1958).

3. By reading into the statute of limitations applicable to Government contract actions a tolling provision fashioned out of the CDA, the Ninth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

"Any breach of contract gives rise to a right of action[.]" 11 Williston, Contracts § 1290 (3rd ed.). The general rule in contract actions is that the cause accrues for purposes of the applicable statute of limitations, 28 U.S.C. §§ 2415-16, at the breach. *U.S. v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984); *U.S. v. Skidmore, Owings & Merrill*, 505 F.Supp. 1101, 1104 n. 3 (S.D.N.Y. 1981).

This action was brought more than six years after the Government gave notice that Hampton had breached the subject contracts. There can be no question that when its

contracting officers sent those notifications, the Government knew all the facts material to its right of action, i.e., that there had been a breach of contract. Any uncertainty on the part of the contracting officers as to the exact amount of the Government's damages would not have constituted lack of knowledge of a fact material to the right of action. *U.S. v. Gavilan Joint Community College Dist.*, 849 F.2d 1246, 1249-50 (9th Cir. 1988); *Skidmore, Owings & Merrill, supra*, 505 F.Supp. at 1104 (the fact that the Government was justified in believing it had suffered no damages until an event occurred subsequent to the contractor's breach "does not alter the date of accrual of the causes of action based upon alleged breach of the contract.").

The CDA only "establishes procedures to resolve existing causes of action and does not create substantive rights." *In re Remington Rand Corp., supra*, 836 F.2d at 831. The Ninth Circuit erred to the extent that it relied on the CDA to determine the existence of the Government's right of action. In effect, the Ninth Circuit read into 28 U.S.C. §§ 2415-16 a new tolling provision that, for purposes of computing the six-year limitations period for Government contract actions, Government claims subject to the CDA do not accrue until a contracting officer has issued a final decision on the claim.

There are several conceptual problems with the Ninth Circuit's decision. First, the decision muddles the distinction between the two limitations periods of § 2415(a). By the Ninth Circuit's reading of the statute, both the six-year period and the one-year period can be triggered by the same administrative action, i.e., issuance

of a contracting officer's final decision. Second, the Government's claim must of necessity exist before it can be the subject of a contracting officer's decision. In other words, the contracting officer has it within his or her power at all times following the breach to issue the final decision which, according to the Ninth Circuit, only then establishes the Government's right of action.

However, "The short answer [to the Ninth Circuit's reading of the statute of limitations] is that Congress did not write the statute that way." *Cf. U.S. v. Naftalin*, 441 U.S. 768, 773, 99 S.Ct. 2077, 60 L.Ed.2d 624 (1979). Section 2416 lists the circumstances that toll the running of the statute of limitations in § 2415; awaiting issuance of a contracting officer's final decision is not one of them. "The starting point in every case involving construction of a statute is the language itself." *Kelly v. Robinson*, 479 U.S. 36, 43, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986). Section 14(b) of the CDA amended 28 U.S.C. § 2401(a), the statute of limitations applicable to claims *against* the Government, by inserting the proviso, "Except as provided by the Contract Disputes Act of 1978." It would have been easy for Congress to have added a similar proviso to § 2415 or to provide in § 2416 that a claim by the Government subject to the CDA does not accrue until a contracting officer issues a final decision on the claim. But Congress did neither. It must, therefore, be presumed that Congress acted intentionally and purposefully in amending § 2401, but in not similarly amending §§ 2415-16. *Cf, Russello v. U.S.*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). When the terms of a statute are unambiguous, as in this case, "judicial inquiry is complete except in rare

and exceptional circumstances." *Demarest v. Manspeaker*, 498 U.S. 184, 190, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991).

Moreover, by inserting the new tolling provision in the statute of limitations, the Ninth Circuit frustrated Congress' purpose when adopting the statute "to promote diligence by the government in bringing claims to trial." *Kass, supra*, 740 F.2d at 1496-97. If the Ninth Circuit's decision stands, Government contracting officers will have the power to postpone unilaterally and indefinitely the running of the six-year statute of limitations on contract claims, a power which Congress deliberately did not grant to contracting officers.

At bottom, therefore, the Ninth Circuit's decision in this case ignores not only the legislative history of the statute of limitations, but also the admonition of this Court that courts have a "duty to refrain from reading a phrase into a statute when Congress has left it out." *Keene Corp. v. U.S., supra*, 124 L.Ed.2d at 128.

4. By holding that suits commenced in the CFC, even when that court lacks jurisdiction, are "administrative proceedings" for purposes of applying the one-year statute of limitations applicable to contract actions brought by the Government, the Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

Under § 2415(a), even if the Government fails to bring its suit within six years after its right of action accrues, the suit still will be timely if brought within one year after a final decision has been rendered in applicable

administrative proceedings. This "savings" clause has been consistently construed according to its plain language. Actions in the CFC are not administrative proceedings, *U.S. v. Dawkins*, 629 F.2d 972, 975 (4th Cir. 1980); a Government claim does not "first accrue" when administrative proceedings are completed; and an action by the Government is barred if filed after expiration of both the original six-year limitations period *and* the one-year savings period following any final administrative determination. *U.S. v. D.H. Dave, Inc.*, 424 F.Supp. 424, 428 (D.Md. 1976); *U.S. v. Lincoln Engineers, Inc.*, 586 F.Supp. 684, 689 (D.R.I. 1984).

Under the CDA, a contractor aggrieved by a final decision of a contracting officer has ninety days to appeal the decision to the appropriate board of contract appeals. In lieu of an appeal, the contractor has one year to commence suit in the CFC or, if the dispute involves the TVA, in district court. Provisions relating to suits in the CFC or in the district courts are found in the part of the CDA concerned with actions in court and judicial review. 41 U.S.C. § 609. Boards of contract appeals, on the other hand, conduct administrative proceedings which are more informal than proceedings in the CFC. *Overall Roofing & Const. Inc. v. U.S.*, 929 F.2d 687, 689-90 (Fed. Cir. 1991). Board of contract appeals proceedings are dealt with in 41 U.S.C. §§ 606-07.

The Ninth Circuit, nevertheless, agreed with the Government's position that the suits filed by Hampton in the CFC were "administrative proceedings" and that the Government had one year after the dismissal of those suits to file this action. The Ninth Circuit came to this conclusion, even though those suits had been dismissed

because the CFC lacked subject matter jurisdiction and even though it is settled that the bringing of an action in a court without jurisdiction does not interrupt the running of the statute of limitations except under circumstances that are not applicable here. 54 C.J.S. Limitations of Actions § 220; *Star-Kist Foods, Inc. v. Chicago, Rock Island & Pacific Railroad Co.*, 586 F.Supp. 252, 254 n. 2 (N.D.Ill. 1984).

The District Court held that the one-year savings clause did not save the Government's claims, because there had been no administrative proceedings after the issuance of the contracting officers' final decisions and the Government's action was filed much more than one year after the last contracting officer's decision was issued. By ruling otherwise, the Ninth Circuit ignored the clear meaning of the applicable statutes and relevant precedent.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

v.

SUNTIP COMPANY,
Defendant-Appellee.

UNITED STATES of America,
Plaintiff-Appellant,

v.

HAMPTON TREE FARMS, INC.,
Defendant-Appellee.

Nos. 93-36147, 94-35977.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 6, 1995.

Decided May 6, 1996.

Federal government brought actions against federal timber buyers to enforce decisions of government contracting officers holding buyers liable for breach of their federal timber sale contracts. The United States District Court for the District of Oregon, Robert E. Jones and Helen J. Frye, JJ., concluded that government's claims were barred by limitations or failure to assert them as compulsory counterclaims in earlier litigation. Government appealed. The Court of Appeals, Canby, Circuit Judge, held that: (1) res judicata did not bar government's claims; (2) statute governing time for commencement of contract action brought by federal government applied to government's actions; (3) for purposes of statute, time does not begin to run for action to enforce government

contracting officer's decision until contracting officer renders his or her decision; and (4) government's claims, which were brought within one year of dismissal of buyers' actions in Court of Federal Claims challenging contracting officers' decisions, were timely.

Reversed and remanded.

Noonan, Circuit Judge, dissented and filed opinion.

Allen L. Lear, United States Department of Justice, Washington, D.C., with whom Gerald M. Alexander and Sean P. Murphy appeared on the briefs, Riley J. Atkins, Assistant United States Attorney, Portland, Oregon, for plaintiff-appellant.

John P. Bledsoe, Lane, Powell, Spears & Lubersky, Portland, Oregon, for defendants-appellees.

Appeal from the United States District Court For the District of Oregon; Robert E. Jones and Helen J. Frye, District Judges, Presiding. Nos. CV-93-00681-REJ, CV-93-00936-HJF.

Before: CANBY, REINHARDT, and JOHN T. NOONAN, Jr.* Circuit Judges.

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* Judge Tang was originally a member of this panel and heard argument in this case. He died prior to circulation of this opinion, and pursuant to General Order 3.2(g), Judge Noonan was drawn as a replacement. Judge Noonan was provided with a tape of the oral argument as well as the briefs and other materials received by the other members of the panel.

CANBY, Circuit Judge.

These cases arise from disputes over several federal timber sale contracts entered many years ago, separately, by Hampton Tree Farms, Inc., and Suntip Company. The controversy between those two firms and the government has passed through several tribunals and acquired an exquisitely byzantine complexity. The present actions, which we may hope will be the last, were brought by the government to enforce decisions of its contracting officers holding Hampton and Suntip liable for breach of their contracts.

Hampton and Suntip asserted two defenses that are the subject of these appeals. First, they argued that the government's claims were barred under the doctrine of res judicata because they should have been asserted as compulsory counterclaims in earlier litigation brought by Hampton and Suntip. Second, they contended that the government's claims were barred by the six-year statute of limitations, 28 U.S.C. § 2415.

In the Hampton action, the district court held that nine of the government's eleven claims were barred by limitations, and that the remaining two were barred for failure to assert them as compulsory counterclaims in earlier litigation. In the Suntip action, the district court held that all claims were barred for failure earlier to assert them as compulsory counterclaims. The government appeals both decisions.

Background

Both issues on appeal -- res judicata and limitations – are affected significantly by the procedural framework established by Congress for resolution of government contract disputes, and by earlier litigation in several forums. It is unfortunately necessary, therefore, to describe these matters, as well as the underlying facts, in some detail.

Beginning in 1978, the United States Forest Service awarded various contracts to Hampton and Suntip for the harvest of timber in National Forests within Oregon. The Forest Service awarded Hampton eleven contracts to cut timber in the Siuslaw National Forest,[1] and awarded Suntip nine contracts to cut timber in four different National Forests.[2] Each contract contains a "termination date" by which time the companies were obliged to cut, remove, and pay for the timber. Neither company performed by the termination dates specified in the contracts. Between

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[1] The dates these contracts were awarded are as follows: Yoncalla Redo 78: October 18, 1978; Slick Falls 79: January 18, 1979; Erickson 8-79: September 7, 1979; Cascade Panther 79: September 11, 1979; Blodgett 008: June 18, 1980; Powder Creek 80: September 30, 1980; Heceta 217: April 2, 1981; Erickson Rock 81: July 29, 1981; Conklin 3: July 29, 1981; Battle Bays: September 17, 1981; and Beamer 213: January 8, 1982.

[2] The dates these contracts were awarded are as follows: Lake: February 5, 1979; Arbor: June 24, 1980; Bathtub: September 30, 1980; Upper Deer Leave: November 18, 1980; Born: January 14, 1981; Buckhead: January 14, 1981; Jewell: March 16, 1981; Whiskey Relog: June 29, 1981; Panther Fork: December 3, 1981.

March, 1986, and April, 1987, the Forest Service notified Hampton and Suntip that their contracts were in default.

Each contract contains a "Failure to Cut" provision, which states:

> In the event of (a) termination for breach, or (b) Purchaser's failure to cut designated timber on portions of Sale Area by Termination date, Forest Service shall appraise remaining Included Timber . . . Such appraisal shall be made with the standard Forest Service method in use at time of termination.
>
> Damages due the United States for Purchaser's failure to cut and remove such timber . . . shall be the amount by which Current Contract Value plus the cost of resale . . . exceeds the resale value at new Bid Rates. If there is no resale, damages due shall be determined by subtracting the value established by said appraisal from the difference between Current Contract Value and Effective Purchaser Credit.

1. The Contract Disputes Act

All of the contracts were subject to the Contract Disputes Act, 41 U.S.C. §§ 601-613.[3] Under that Act, the government's claims against the timber companies must

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[3] All but one of the contracts expressly provided that the Contract Disputes Act would govern resolution of any disputes. The exception was Hampton's Yoncalla Redo 78 contract, which preceded the Contract Disputes Act, but Hampton elected to have disputes regarding this contract processed under the Contract Disputes Act as well.

first be submitted for decision by a contracting officer. 41 U.S.C. § 605(a). The Act further provides:

> The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal is timely commenced as authorized by this chapter.

§ 605(b). One authorized method of appeal is for the contractor, within 90 days of receipt of the contracting officer's decision, to appeal to the agency (here the Department of Agriculture) board of contract appeals. § 606. "A contractor may appeal the board's decision to the Court of Appeals for the Federal Circuit." § 607(g)(1)(A). An alternative method is for the contractor, within twelve months after receipt of the contracting officer's decision, to bring an action for review in the Court of Federal Claims. § 609(a)(1), (3). Either party may appeal a decision of the Court of Federal Claims to the Federal Circuit. 28 U.S.C. § 1295(a)(3).

2. *The Contracting Officers' Decisions*

In the cases before us the government proceeded to follow the steps prescribed by the Act. Once it had determined that Hampton and Suntip had defaulted, each claim was submitted to a contracting officer who calculated the damages the companies owed the government under the formula stated in the contracts. Between July, 1987, and May, 1988,[4] contracting officers issued "Final

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[4] Contracting officers issued Final Decisions regarding Hampton's contracts on the following dates: Conklin 3: March

Decisions" stating the damages that Hampton and Suntip owed to the government by reason of their breach of each contract.

3. *The Declaratory Judgment Actions*

A few years earlier, when it had become apparent that many timber companies could not carry out harvesting contracts without a loss, the Forest Service adopted a Multi-Sale Extension Policy, which allowed participating companies an additional five years to complete their contracts. *See* 48 Fed.Reg. 54812 (1983). In return, the participating companies agreed to request no further extensions and to certain contract modifications. To qualify, companies were required to submit their Multi-Sale Extension Plans by February 15, 1984. Neither Hampton nor Suntip submitted Plans by this deadline, because they relied on an injunction issued by the district court in other litigation, *North Side Lumber Co. v. Block*, No. 83-490 (D.Or. Feb. 15, 1984).

10, 1987; Beamer 213: April 21, 1987; Erickson 8-79: July 8, 1987; Battle Bays: August 3, 1987; Powder Creek 80: August 24, 1987; Heceta 217: November 4, 1987; Cascade Panther 79: December 7, 1987; Blodgett 008: January 4, 1988; Slick Falls 79: March 17, 1988; Erickson Rock 81: March 29, 1988; and Yoncalla Redo 78: May 31, 1988.

Contracting officers issued Final Decisions regarding Suntip's contracts on the following dates: Panther Fork: July 23, 1987; Jewell: August 6, 1987; Upper Deer Leave: August 10, 1987; Lake: August 19, 1987; Arbor: September 17, 1987; Born: December 3, 1987; Buckhead: December 23, 1987; Whiskey Relog: March 4, 1988; and Bathtub: May 18, 1988.

The district court's injunction in North Side was vacated by this court on February 20, 1985.[5] *North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir.), *cert. denied*, 474 U.S. 919, 931, 106 S.Ct. 248, 265, 88 L.Ed.2d 256, 271 (1985). Many of the companies in the plaintiff class settled with the Forest Service, and were allowed to file late Multi-Sale Extension Plans. Hampton and Suntip did not settle. In May 1985, they both filed Multi-Sale Extension Plans, which the Forest Service rejected as untimely.

Hampton responded in June 1985 by bringing an action in the district court for declaratory and injunctive relief requiring the Forest Service to accept their Multi-Sale Extension Plans. After receiving several contracting officers' decisions, Hampton filed an amended and supplemental complaint on April 7, 1988, alleging wrongful termination of the contracts and related claims. In answering the Supplemental Complaint on April 27, 1988, the United States did not assert a counterclaim for the damages Hampton owed it for breaching the contracts. In October, 1989, Hampton filed a Supplement to its First Amended Complaint, and again in answering on November 17, 1989, the government did not assert a counterclaim against Hampton.

On December 10, 1987, Suntip initiated an action in district court, seeking declaratory and injunctive relief

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[5] Due to various delays and an unsuccessful petition for certiorari, this court's mandate in *North Side* did not reach the district court until December 2, 1985. At that point, the injunction was lifted and the government was free to enforce its contracts by issuing notices of default and proceeding with decisions of contracting officers.

similar to that sought by Hampton. In April 1988, the government answered the complaint without asserting a counterclaim for the damages Suntip owed it for breaching the contracts. Suntip filed a supplement to its complaint on October 30, 1989. The government filed an answer to Suntip's supplemental pleading on November 17, 1989, again without asserting its damages claims as compulsory counterclaims.

The district court granted summary judgment for Hampton and Suntip, holding that Hampton and Suntip's Plans had been timely, even though they were submitted past the regulatory deadline, because they were submitted while the *North Side* injunction was still in effect. *Hampton Tree Farms, Inc. v. Block*, No. 85-1085, 1987 WL 115596 (D.Or. Apr. 20, 1987); *Suntip Co. v. Yeutter*, No. 87-1360, 1990 WL 357213 (D.Or. May 7, 1990). On appeal, the cases were consolidated and this court reversed, holding that, once the *North Side* injunction was held to be void, rights acquired under it could not be enforced. *Hampton Tree Farms, Inc. v. Yeutter*, 956 F.2d 869, 871 (9th Cir.), *cert. denied*, 506 U.S. 816, 113 S.Ct. 56, 121 L.Ed.2d 25 (1992). We also held that the Forest Service's refusal to accept Hampton's and Suntip's late Plans was not arbitrary, because the other applicants whose untimely Plans had been accepted had settled with the Forest Service, and Hampton and Suntip had not. *Id.* at 872.

4. *The Court of Federal Claims Actions*

Hampton and Suntip did not stake everything on their action in district court for declaratory and injunctive relief. Between March 4, 1988 and May 24, 1989, they filed

actions in the Court of Federal Claims contesting the various decisions of the contracting officers.[6] The actions all were filed within the requisite one year of the contracting officers' decisions. *See* 41 U.S.C. § 609(a)(3). Shortly after filing the first action, Hampton asked the Court of Federal Claims to stay its hand until the action in district court for declaratory and injunctive relief had been resolved. The Court of Federal Claims granted the stay, and later extended it to await our decision on appeal of the district court's decision. Suntip also sought and was granted a stay.

Meanwhile, on May 3, 1988, the government moved to dismiss one of Hampton's suits in the Court of Federal Claims on the ground that 28 U.S.C. § 1500 deprived that court of jurisdiction over the claim. Subsequently, the Court of Federal Claims applied this motion to the remainder of Hampton's suits and all of Suntip's suits. Section 1500 provides that

> [t]he United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has

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[6] Hampton filed actions in the Court of Federal Claims on the following dates: Conklin 3: March 4, 1988; Beamer 213: April 15, 1988; Erickson 8-79: June 30, 1988; Battle Bays: July 20, 1988; Powder Creek 80: August 12, 1988; Heceta 217: October 20, 1988; Cascade Panther 79: November 22, 1988; Blodgett 008: December 15, 1988; Slick Falls 79: February 23, 1989; Erickson Rock 81: March 15, 1989; and Yoncalla Redo 78: May 24, 1989.

Suntip filed suits in the Court of Federal Claims on the following dates: Panther Fork: July 11, 1988; Jewell: July 20, 1988; Upper Deer Leave: July 20, 1988; Lake: August 9, 1988; Arbor: August 25, 1988; Born: November 22, 1988; Buckhead: December 15, 1988; and Bathtub: May 9, 1989.

> pending in any other court any suit or process against the United States. . . .

The scope and effect of section 1500 was at the time a matter of some uncertainty and controversy, and the issue eventually found its way to the Supreme Court in *Keene Corp. v. United States*, 508 U.S. 200, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993). The Court of Federal Claims extended its stay in the Hampton and Suntip cases to await the *Keene* decision.

Keene accepted the historical meaning of section 1500 as depriving the Court of Federal Claims of jurisdiction when there is pending in another court a claim against the United States "based on substantially the same operative facts . . . , at least if there was some overlap in the relief requested." *Keene*, 508 U.S. at 212, 113 S.Ct. at 2042-43. The Court rejected a contention that the Court of Federal Claims was deprived of jurisdiction under section 1500 only if the other, pending action could have been pleaded in the Court of Federal Claims. *Id.* at 212-14, 113 S.Ct. at 2043.

Even before the Supreme Court decided *Keene*, Suntip sent a letter to the Court of Federal Claims stating that it had decided to acquiesce in the government's motion to dismiss. Accordingly, on November 5, 1992, the Court of Federal Claims dismissed Suntip's cases for lack of subject matter jurisdiction. On July 14, 1993, after the Supreme Court's *Keene* decision was handed down, the Court of Federal Claims dismissed Hampton's actions pursuant to 28 U.S.C. § 1500.

5. The Present Actions

In June 1993, after all of Suntip's prior litigation had ended, the United States filed its Complaint on Claim for Debt in district court, seeking to enforce its contracting officers' decisions against Suntip. In August 1993, after Hampton's actions in the Court of Federal Claims were dismissed, the government filed a similar action against Hampton.

As we have already related, the district court ruled against the government on two grounds: (1) res judicata, because the government had failed to assert its claims in Hampton's and Suntip's earlier district court actions for declaratory and injunctive relief, and (2) limitations. We now address those rulings.

Res Judicata – Compulsory Counterclaim

It is Hampton's and Suntip's contention, and it apparently was the view of the district court, that Rule 13(a) of the Federal Rules of Civil Procedure[7] required the government to litigate the *merits* of these contracting

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[7] Fed.R.Civ.P. 13(a) provides:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action. . . .

disputes as a compulsory counterclaim in district court. We reject that contention because its acceptance would frustrate Congress's purposes in enacting the Contract Disputes Act.

The government could not take legal action on its contract claims without first making them "the subject of a decision by the contracting officer." 41 U.S.C. § 605(a); *Sharman Co. v. United States*, 2 F.3d 1564, 1568-69 & n. 6 (Fed.Cir.1993). Congress could scarcely have been clearer in legislating that contracting officers' decisions "shall be final and conclusive *and not subject to review by any forum, tribunal,* or Government agency, unless an appeal or suit is timely commenced *as authorized by this chapter.*" 41 U.S.C. § 605(b) (emphasis added). The two forms of appeal authorized by this chapter are appeals to an agency board of contract appeals or an action in the Court of Federal Claims. *Id.*, §§ 606, 609(a)(1). The intent behind this scheme is to confine these government contract disputes to expert tribunals created expressly for that purpose. *See* 1978 U.S.C.C.A.N. 5235 *et seq.* That intent is defeated if a contracting party may, by filing a declaratory judgment action in district court, compel the government to litigate the merits of its contracting officers' decisions in district court. *See Ingersoll-Rand Co. v. United States*, 780 F.2d 74, 78 (D.C.Cir.1985) (Contract Disputes Act requires action challenging termination of government contract to be brought in expert Court of Claims, not district court).

The Federal Rules of Civil Procedure cannot be construed to expand the jurisdiction of the district courts. Fed.R.Civ.P. 82. They cannot create jurisdiction where none exists. *United States v. Sherwood*, 312 U.S. 584, 589-90,

61 S.Ct. 767, 771, 85 L.Ed. 1058 (1941). Because Congress has required contracting officers' decisions to be challenged only before a Board of Contract Appeals or in the Court of Federal Claims, the compulsory counterclaim provision of Rule 13(a) cannot compel the government to litigate the merits of its contract claims in the district court.

It follows that the district court erred in ruling that the government was required to litigate the merits of its disputes in district court. That point does not quite dispose of the entire res judicata question, however.

The government contends that its present action is simply one to enforce final decisions of its contracting officers. Because neither Hampton nor Suntip appealed to the Department of Agriculture's Board of Contract Appeals, and because their actions in the Court of Federal Claims have been dismissed for lack of jurisdiction, the contracting officers' decisions are now "final and conclusive and not subject to review by any forum." § 605(b). For most practical purposes, then, the government's present suit is similar to a suit on a judgment, because the merits of the officers' decisions are not subject to attack. *See Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1562 n. 4 (Fed.Cir.1990) ("[t]he government may obtain a judgment on the basis of such [contracting officer's] decision in a state or federal court without litigating the merits"), *cert. denied*, 499 U.S. 919, 111 S.Ct. 1308, 113 L.Ed.2d 243 (1991).

The question then arises whether the government was required to file these actions to enforce its contracting officers' *final* decisions as compulsory counterclaims

in Hampton's and Suntip's actions for declaratory and injunctive relief. We conclude that it was not, because any such action would have been premature. The government's present enforcement action depends upon its contracting officers' decisions being final, conclusive, and not subject to further challenge on the merits. The contracting officers' decisions are final and conclusive "unless an appeal or suit is timely commenced as authorized" by the Contract Disputes Act. § 605(b). Under the Act, Hampton and Suntip had up to one year from the date of each contracting officers' decision to challenge it in the Court of Federal Claims. § 609(a)(3). At the time the government filed its answers to the supplemental pleadings in Hampton's and Suntip's district court actions, all of the contracting officers' decisions either were already the subject of suits in the Court of Federal Claims (and were thus within the literal exception of Rule 13(a) for claims pending in another court), or were susceptible to such suits because the one-year period to bring them had not expired. With the finality of the contracting officers' decisions not yet established, the government could not be compelled to enforce them as "final" decisions in the district court. The contracting officers' decisions might be changed or reversed, but only by one of the two tribunals authorized by the Contract Disputes Act, not by the district court. We conclude that the government was not required to assert its enforcement action as a compulsory counterclaim in Hampton's

and Suntip's district court actions for declaratory and injunctive relief.[8]

Statute of Limitations

The district court held that the government's claims against Hampton were barred by limitations, and Suntip also urges limitations in support of the district court's judgment in its favor. The statute in issue is 28 U.S.C. § 2415(a), which provides:

> every action for money damages brought by the United States . . . which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later. . . .

As the district court recognized, there is no doubt that this statute applies to actions by the government when it sues directly on a contract claim. *United States v. Westerband-Garcia*, 35 F.3d 418, 421 (9th Cir.1994); *United States v. Gavilan Joint Community College Dist.*, 849 F.2d 1246, 1249 (9th Cir.1988). The government contends, however, that its action to enforce a final contracting officers' decision is not a suit on the underlying contract, but is comparable

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[8] Our resolution of this issue makes it unnecessary for us to address the government's additional argument that its claim for enforcement of the contracting officers' decisions, in which the merits are not at issue, does not arise from the same transaction or occurrence as the underlying contract claims that were the subject of Hampton's and Suntip's district court actions.

to a suit on a judgment. A judgment is not a "contract" subject to section 2415. *See United States v. Southern Fabricating Co.*, 764 F.2d 780, 782 (11th Cir.1985) (consent judgment); *United States v. Hannon*, 728 F.2d 142, 145 (2nd Cir.1984) (default judgment).

The government's argument is not without force, but we conclude that it is not consistent with the language of section 2415. The final contracting officers' decisions are comparable to judgments because they are not now open to challenge on the merits, but they are not in fact judgments. Indeed, the purpose of this action is to reduce the orders to judgment. Section 2415 requires that an action by the government "founded upon any contract" be brought within six years or "within one year *after final decisions have been rendered in applicable administrative proceedings.*" (Emphasis supplied). This language appears to contemplate actions of exactly the type that the government is now bringing. We conclude that section 2415 applies.

We agree with the government, however, that time does not begin to run for an enforcement action until the contracting officer renders his or her decision. Under the Contract Disputes Act, the government cannot take legal action on its claim until it first makes it "the subject of a decision by the contracting officer." § 605(a); *Sharman*, 2 F.3d at 1568-69 & n. 6. Time cannot run against the government until it is procedurally possible for it to sue. *See Crown Coat Front Co. v. United States*, 386 U.S. 503, 511, 87 S.Ct. 1177, 1181-82, 18 L.Ed.2d 256 (1967) (action against government accrues under section 2401 only upon completion of required administrative process).

Hampton and Suntip rely on *United States v. Gavilan Joint Community College Dist.*, 849 F.2d 1246, 1249 (9th Cir.1988), in which we stated that "a cause of action generally accrues when a plaintiff knows or has reason to know of the injury that is the basis of the action." They also rely on the 1994 amendments to the Contract Disputes Act, which modified section 605(a) so that it now states:

> All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. . . . [E]ach claim by the government . . . *shall be submitted within 6 years after the accrual of the claim.*

(Emphasis added.) Hampton and Suntip point out that this statute makes no sense if a claim does not accrue until the contracting officer decides.[9]

Hampton and Suntip fail to differentiate, however, between an action by the government on the underlying contract and an action like the present one, to enforce decisions of contracting officers. A claim on the *contract* may well accrue when the government is aware of the breach and injury, and it must submit that claim to a contracting officer within six years of accrual. An action

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[9] Hampton and Suntip recognize that the 1994 amendments do not apply to this case; they offer the amendment only to show the common meaning, accepted by Congress, of "accrual of the claim."

to enforce a contracting officer's decision, however, cannot accrue until the decision is made because suit cannot commence before that time.[10]

When the six-year limitation period of section 2415 is counted from the date of the contracting officers' decisions, the government's enforcement action against Hampton is timely as to all except two decisions. The enforcement action against Suntip is timely for all decisions.

The government argues, finally, that even the two decisions that are barred under the six-year provision of section 2415 may properly be enforced, because they fall within the alternative provision permitting an action to be brought "within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law." § 2415(a). The government brought all of its enforcement actions within one year of the dismissal of Hampton's and Suntip's actions in the Court of Federal Claims.

Hampton and Suntip contend that an action in the Court of Federal Claims is not an "administrative proceeding" within the meaning of section 2415(a); only an appeal to the Board of Contract Appeals qualifies. They

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[10] The government contends that an action to enforce a contracting officer's decision should not accrue until 30 days after the officer's decision, because that is when the contractor is ordered to pay. *See Westerband-Garcia*, 35 F.3d at 422 ("[t]he right of action accrues on the date when the damages to be paid to the government are due"). We need not address this point, because the timeliness of no claim in this case depends on the additional 30 days.

rely, inter alia, on *United States v. Dawkins*, 629 F.2d 972, 975 (4th Cir.1980), in which the Fourth Circuit held that an action in the Court of Claims after an appeal to a Board of Contract Appeals did not qualify as an "administrative proceeding" under section 2415. *Dawkins*, however, did not apply the Contract Disputes Act. It also preceded the Federal Courts Improvement Act of 1982, Pub.L. 97-164, 96 Stat. 25 (1982), which changed the Court of Claims from an Article III to an Article I court, and which allowed contractors to challenge a contracting officer's decision *either* before a Board of Contract Appeals *or* in the now-denominated Court of Federal Claims. These are now parallel avenues of review, and there is no reason to treat them differently. In our view, the reference in section 2415 to "applicable administrative proceedings required by contract or by law" must now be read to include a suit in the Court of Federal Claims challenging a decision of a contracting officer. As the present case indicates, proceedings in the Court of Federal Claims can be very lengthy and are not within the control of the government. The decision of that court can change or reverse the contracting officer's decision.[11] If the alternative clause of section 2415 is not applied to extend

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[11] Indeed, the contracting officer's decision loses its finality when an action challenging it is filed in the Court of Federal Claims. 41 U.S.C. 605(b) ("The contracting officer's decision on the claim shall be final and conclusive . . . unless an appeal is timely commenced"). The officer's decision then becomes final only when the Court proceeding is concluded. It is therefore logical that the one-year limitation of section 2415 begins to run at that point, even if the contracting officer's decision itself is the relevant "final decision[ ] rendered in applicable administrative proceedings" under section 2415.

limitations, it is possible that the government's time to bring an enforcement action will expire before it has a final decision to enforce. We cannot accept such an impractical interpretation of section 2415 and the Contract Disputes Act.[12] We therefore conclude that the alternative clause of section 2415(a) applies to proceedings in the Court of Federal Claims, with the result that all of the government's claims are timely.

The Absence of Jurisdiction in the Court of Federal Claims

Hampton and Suntip contend that no effect should be given the proceeding in the Court of Federal Claims,

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[12] The government asserts that its regular practice is not to attempt to enforce contracting officers' decisions until a proceeding in the Court of Federal Claims has concluded or the time for bringing such a suit has expired. In the one case Hampton and Suntip cite in which the government attempted to enforce a contracting officer's decision in district court before the twelve months to file suit in the Court of Federal Claims had passed, the Eighth Circuit expressed "no view" as to whether the statute of limitations would have continued to run while the contractor's challenges were before the Court of Federal Claims. *United States v. BLH, Inc.*, 773 F.2d 232, 234 (8th Cir.1985). Instead, it held that the district court should have stayed the government's action to enforce the contracting officer's decision pending resolution of the challenge to that decision before the Court of Federal Claims. *Id.* The Eighth Circuit's decision is consistent with the view that a district court cannot enforce the contracting officer's decision until a challenge to that decision in the Court of Federal Claims is resolved. The Court of Federal Claims proceedings may, then, be treated as required proceedings when the contractor elects to sue in the Court of Federal Claims.

either to forestall the need to file a compulsory counterclaim or to serve as an alternative measure of limitations, because that Court was without jurisdiction to hear Hampton's and Suntip's challenges to the contracting officers' decisions. *See* 28 U.S.C. § 1500; *Keene*, 508 U.S. at 210-14, 113 S.Ct. at 2042-43. To Hampton and Suntip, there is an unfair lack of symmetry in holding, as we did in *Hampton Tree Farms, Inc. v. Yeutter*, 956 F.2d at 871, that they were not entitled to rely on the void *North Slope* injunction, when the government here is permitted to rely on a void Court of Federal Claims' proceeding to escape the effects of res judicata and limitations.

Despite the surface plausibility of this contention, there are material differences between our ruling in *Hampton Tree Farms, Inc. v. Yeutter* and our ruling today. In *Hampton*, Hampton and Suntip sought to rely on the rights conferred by an injunction sought and obtained by their class. We relied on established precedent to the effect that a party is not entitled to the benefits of an injunction to which it was never entitled. *See United States v. United Mine Workers*, 330 U.S. 258, 295, 67 S.Ct. 677, 696-97, 91 L.Ed. 884 (1947); *Latrobe Steel Co. v. United Steelworkers of America*, 545 F.2d 1336, 1346 (3d Cir.1976).

In the present case, the United States did not seek review of the contracting officers' decisions in the Court of Federal Claims; Hampton and Suntip did. The government promptly moved to dismiss; Hampton and Suntip sought and obtained stays. During the period when the controversial question of the jurisdiction of the Court of Federal Claims was being resolved, the United States as a

practical matter could not enforce the contracting officers' decisions: on the face of section 605(b) of the Contract Disputes Act, those decisions were not "final" because a suit had been timely commenced and was pending in the Court of Federal Claims. Thus the United States does not seek to obtain any benefits under a ruling it sought from the Court of Federal Claims for which there was no jurisdiction. Instead, it asks us to recognize the fact that, while the Court of Federal Claims proceeding was pending and jurisdiction was being disputed, the government could not practicably bring an enforcement action in district court. For reasons we have already stated, the relief sought by the government is supported by the Contract Disputes Act and section 2415. In granting it, we see no true inconsistency with our prior ruling in *Hampton Tree Farms, Inc. v. Yeutter*.

Conclusion

Because neither Fed.R.Civ.P. 13(a) and the principles of res judicata, nor the statute of limitations, 28 U.S.C. § 2415(a), bars the government's actions, we reverse the summary judgments of the district court. The government asserts that, because we have ruled that its contracting officers' decisions may not be challenged on the merits in this proceeding, we must order summary judgment in favor of the government. Hampton and Suntip argue, however, that they have asserted defenses not going to the merits of the contracting officers' decisions. They have not explained what those defenses may be, and we leave it to the district court to determine whether such defenses may be asserted without reference to the

merits of the contracting officers' decisions. If not, the government is entitled to judgment.

REVERSED AND REMANDED.

NOONAN, Circuit Judge, dissenting:

"What is sauce for the gander is sauce for the goose." This ancient adage has apparently no application when the gander is an agency of the United States and the geese are two corporations engaged in the timber industry.

This court has held that these two plaintiffs had no rights under an injunction issued by the district court, which this court later found to have been issued invalidly. *Hampton Tree Farms, Inc. v. Yeutter*, 956 F.2d 869, 871 (9th Cir.) *cert. denied*, 506 U.S. 816, 113 S.Ct. 56, 121 L.Ed.2d 25 (1992). But the majority in this case holds that a proceeding in the Court of Federal Claims, which had no jurisdiction of the proceeding, absolves the United States from its obligation under Federal Rule of Civil Procedure 13 to have filed compulsory counterclaims. It is difficult, if not impossible, to understand what the relevant difference is in the situation of the timber companies relying on a void injunction and the United States relying on a proceeding which was also void because there was no jurisdiction whatsoever.

The distinction that the majority offers is that the timber companies initiated the injunction proceeding, while the United States was not the initiator of the proceeding in the Court of Federal Claims. But in each case what is used as a legal basis is a legal nullity. *See Morongo Band of Mission Indians v. Calif. State Bd. of Equalization,*

858 F.2d 1376, 1380 (9th Cir.1988) (holding that a court without jurisdiction is without power to do anything except to dismiss the case and that any other order issued by the court would be a nullity), *cert. denied*, 488 U.S. 1006, 109 S.Ct. 787, 102 L.Ed.2d 779 (1989); *see also In re Establishment Inspection of Hern Iron Works*, 881 F.2d 722, 726-27 (9th Cir.1989) (stating that any court order issued without jurisdiction is a nullity or "nothing at all"); *Watts v. Pinckney*, 752 F.2d 406, 409-10 (9th Cir.1985) (holding that a judgment by a court without jurisdiction is void or a legal nullity). The plaintiffs in the injunction case were ultimately treated as though they should have known all along that they had no rights. I see no reason why the United States should be treated differently.

Under Federal Rule of Civil Procedure 13(a), the government was required to state any claim as a counterclaim which existed at the time Hampton and Suntip served it with their pleadings, in June 1985 and December 1987 respectively, and their amended pleadings in April 1988 and October 1989 respectively. Fed.R.Civ.P. 13(a). The government did not do so. The exception to the compulsory counterclaim requirement for instances in which "at the time the action was commenced the claim was the subject of another pending action" does not apply here. *Id.* Hampton's action in district court commenced in June 1985; Suntip's in December 1987. In June 1985, the government's claim against Hampton was not the subject of another pending action. Nor was its claim against Suntip the subject of another pending action in December 1987. An action is one that is commenced in court. Fed.R.Civ.P. 2, 3. Consideration of a contract dispute by a contracting officer doesn't cut it. The Court of

Federal Claims did not consider Hampton's and Suntip's challenges until after the time they commenced their actions in district court. Nor did the government even raise any counterclaim for damages in the Court of Federal Claims. In short, the government's counterclaim was never the subject of a pending action in that court. Under Rule 13(a), the government is not saved from its failure to assert its counterclaims.

The majority takes the position that the United States did not have to file its counterclaims "because any such action would have been premature." The majority opinion mischaracterizes the government's claims as an enforcement action dependent upon a final decision of a contracting officer that is not subject to further attack on the merits. The government's claims stem from its contracts. The Contract Disputes Act does not create these claims. *See* 41 U.S.C. §§ 601-613; *In re Remington Rand Corp.*, 836 F.2d 825, 830-31 (3d Cir.1988) (holding that the Contract Disputes Act creates no substantive contractual rights but instead "assumes the existence of a traditional contractual cause of action"). The government's claims arose from Hampton's and Suntip's breach of contract dating back to their failure to meet the performance deadlines sometime before 1986. The finality and unreviewability of the contracting officers' decisions on the merits did not give the government any new claims. Once Hampton and Suntip breached the contracts, the government had a right to payment. This right to payment was based on the breached contracts, not the finality and unreviewability of the contracting officers' decisions. Such finality was not in any way necessary for the government to assert its counterclaims. For example, had the

Court of Federal Claims had jurisdiction over Hampton's and Suntip's complaints, the government's claims for damages stemming from the breach of contract could have been asserted as a counterclaim for damages in the Court of Federal Claims, notwithstanding any lack of finality in the contracting officers' decisions or the fact that those decisions were still reviewable. *See* 28 U.S.C. § 2508; *see, e.g., Insurance Co. of North America v. United States*, 951 F.2d 1244, 1245 (Fed.Cir.1991). Likewise, in its response to Hampton's and Suntip's complaints in district court, the government could have easily asserted a claim for its right to payment under the contract and noted that the liability would be established once the contracting officers' decisions become final. Additional pleading in response to Hampton's and Suntip's complaints filed in the district court would hardly have imposed a burden on the government and would have in no way frustrated the purpose of the Contract Disputes Act in settling the merits of disputes over government contracts of an executive agency.

The reason why the actions are asserted to have been premature was because of the void proceedings in the Court of Federal Claims. Those proceedings were before a court whose jurisdiction is as relevant as if the United States had been sued by the plaintiffs in the International Court at the Hague. In the view of the United States itself, as asserted in the Court of Federal Claims litigation, the plaintiffs were in the wrong forum. Knowing that, the government should have acted to bring its actions for damages from the breach of contract as compulsory counterclaims. Not having done so, the government is barred. I would affirm the judges of the two district courts.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff,	)	Civil No. 93-936-FR
v.	)	OPINION
HAMPTON TREE FARMS, INC., Defendant.	)	(Filed Oct. 15, 1993)

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FRYE, Judge:

The matters before the court are 1) the motion for summary judgment of the defendant, Hampton Tree Farms, Inc. (#6); and 2) the cross-motion for summary judgment of the plaintiff, the United States of America (#14).

BACKGROUND

This litigation between the government and Hampton Tree Farms, Inc. (Hampton) involves eleven contracts for the cutting of timber on public lands. A concise history of this dispute is chronicled in *Hampton Tree Farms, Inc. v. Yeutter*, 956 F.2d 869 (9th Cir.), *cert. denied*, 113 S.Ct. 56 (1992) (hereafter, the Hampton Tree Farms case), a consolidated action involving eleven timber sale contracts between Hampton and the United States Forest Service (the Forest Service) and eight timber sale contracts between Suntip Co. (Suntip) and the Forest Service. The United States Court of Appeals for the Ninth Circuit stated:

> In the late 1970s, purchasers bid up the price of government timber for future cutting. Many, including Hampton and Suntip, entered into purchasing contracts which locked them into high prices. After the economic downturn of the early 1980s, many of these companies faced substantial losses in meeting their contractual obligations.
>
> In response to Congressional pressure, the Forest Service adopted the "Multi-Sale Extension Policy" (MSEP). The MSEP granted those timber companies which chose to participate a

five-year extension for completing their contracts. In return, the companies forfeited eligibility for any additional contract extensions and accepted certain modifications of their contracts. The final version of the MSEP was published in the Federal Register on December 7, 1983. It required the companies wishing to participate in the program to submit a plan to the Forest Service by February 15, 1984. 48 Fed.Reg. 54,812, 54[,]814 (1983).

Hampton and Suntip chose not to submit MSEP plans in accordance with the February 15, 1984 deadline. Instead, they chose to rely on a district court injunction then on appeal. *North Side Lumber Co. v. Block,* No. 83-490, slip op. (D.Or. Feb. 15, 1984). In *North Side,* the plaintiff class of timber companies was seeking a judicial remedy for the economic problem addressed by the MSEP. The timber companies claimed that it had become commercially impracticable to perform their contracts. They requested that the district court allow them to rescind the contracts and enjoin the Forest Service from enforcing them.

On February 15, 1984, the *North Side* district court issued a preliminary injunction which ordered the Forest Service not to enforce its contracts with members of the plaintiff class. It also enjoined enforcement of the February 15, 1984 deadline for submitting MSEP plans. The injunction required the Forest Service to allow class members 30 days following dissolution of the preliminary injunction "to submit and have considered by the Forest Service" MSEP plans. *North Side,* slip op. at 2.

On February 20, 1985, this court reversed that injunction, holding that the district court lacked jurisdiction over the plaintiffs' contract claims. *North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir. 1985). Due to delays related to petitions for rehearing and for certiorari, this court's mandate in *North Side* did not issue until November 28, 1985. The district court received the mandate on December 2, 1985. The parties agree that the injunction was dissolved upon the district court's receipt of the mandate.

In May 1985, while the injunction was still in effect, both Hampton and Suntip submitted MSEP plans for Forest Service approval. Both resubmitted their plans in December, within 30 days of the injunction's dissolution.

In 1986 and 1987, the Forest Service informed Hampton and Suntip that they had not met the performance deadlines in their contracts and that the contracts were terminated. The Forest Service refused to accept their MSEP plans, because the plans were filed after the original February 15, 1984 deadline. . . .

[T]he district court granted Hampton and Suntip summary judgment, ordering the Forest Service to approve their MSEP plans. *Hampton Tree Farms, Inc. v. Block*, No. 85-1085, 1987 WL 115596 (D.Or. April 20, 1987); *Suntip Co. v. Yeutter*, No. 87-1360 (D.Or. May 10, 1990). Because Hampton and Suntip had filed their MSEP plans while the injunction was still in effect, the court ruled that the filings had been timely.

In Hampton's case, the court also ruled that the Forest Service's rejection of its application was "seemingly arbitrary." *Hampton*, slip op. at 2.

> In Suntip's case, the court ruled that, in refusing to consider late-filed MSEP applications, the Forest Service had changed, without proper administrative procedure, the rule it had adopted in compliance with the *North Side* injunction. In that case, the court also ruled that the Forest Service was estopped from denying the "full force and effectiveness" of the injunction. *Suntip,* slip op. at 2-3.

The Hampton Tree Farms case, 956 F.2d at 870-71.

Thus, the Hampton and Suntip timber sale contracts share a common history. During 1986 and 1987, the Forest Service sent notices to Hampton and Suntip advising them that eleven of Hampton's contracts and nine of Suntip's contracts were in default. Thereafter, the contracting officer for each contract determined the amount of the government's damages and issued a "final decision" as to each sale. He then notified Hampton and Suntip of each of his determinations.

Within a year after receiving each final decision, Hampton and Suntip filed an action in the Court of Federal Claims challenging each of the government's decisions. On May 3, 1988, the government moved to dismiss the cases filed in the Court of Federal Claims, arguing that 28 U.S.C. § 1500 divested the Court of Federal Claims of subject matter jurisdiction. The Court of Federal Claims did not rule forthwith on the government's motions to dismiss. By June 27, 1989, the Court of Federal Claims had entered orders as to Hampton's

eleven contracts and Suntip's nine contracts staying further proceedings pending final disposition of the consolidated *Hampton Tree Farms* case in the Ninth Circuit Court of Appeals.

In late 1991, the Ninth Circuit Court of Appeals ruled in the consolidated Hampton Tree Farms cases, reversing the two district court rulings in favor of Hampton and Suntip. The Ninth Circuit Court of Appeals held that, because the *North Side* injunction was issued without the district court having subject matter jurisdiction, it was void for all purposes and the companies had mistakenly relied upon it. *Hampton Tree Farms*, 956 F.2d at 871.

In May, 1992, prompted by the decision of the United States Court of Appeals for the Federal Circuit in *UNR Indus. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992), *aff'd sub nom., Keene Corp. v. United States*, 113 S.Ct. 2035 (1993), the government renewed its still pending motion to dismiss the cases on appeal to the Court of Federal Claims. Thereafter, the Court of Federal Claims dismissed all of the actions filed by Suntip in November, 1992 and all of the actions filed by Hampton in July, 1993 for lack of subject matter jurisdiction.

On June 9, 1993, the government filed its complaint against Suntip in this court, seeking to recover the damages assessed by the contracting officers in their final decisions. *United States v. Suntip Co.*, Civil No. 93-681-JO (hereafter, *U.S. v. Suntip*). Suntip moved to dismiss the complaint for failure to state a claim, contending that each claim was time-barred on the face of the complaint. The government responded to Suntip's motion to dismiss the complaint with a motion for summary judgment and

evidence outside the pleadings. Suntip then filed a cross-motion for summary judgment, asserting that the claims of the government were, in addition to being time-barred, barred by the doctrine of *res judicata*, because the government had failed to assert its claims as compulsory counterclaims in *Suntip Co. v. Yeutter*, No. 87-1360 (D.Or. May 10, 1990), *rev'd sub nom., Hampton Tree Farms, Inc. v. Yeutter*, 956 F.2d 869 (9th Cir.), *cert. denied*, 113 S.Ct. 56 (1992).

The motion of Suntip to dismiss the complaint and the motion of the government for summary judgment in *U.S. v. Suntip* came on for hearing before the Honorable Robert E. Jones, United States District Judge, on September 20, 1993. Because the government had responded to Suntip's motion to dismiss with extra pleading materials, Suntip's motion to dismiss was treated by Judge Jones as a motion for summary judgment. On October 7, 1993, Judge Jones dismissed the government's action against Suntip, holding:

> While the government's complaint is not time-barred on its face, because its claims for damages were compulsory counterclaims under Fed. R. Civ. Pro. 13(a), they should have been asserted in 1988 when the government filed its answer to Suntip's suit for declaratory relief, or, at the latest, in 1989 when Suntip filed the last of its claims court appeals. Because they were not, they are now barred by *res judicata* and Suntip's cross-motion for summary judgment is granted.

U.S. v. Suntip, Opinion and Order, p. 2.

The government filed its complaint in this action on August 2, 1993. Hampton has alleged the statute of limitations and *res judicata* as affirmative defenses. However,

Hampton has moved for summary judgment only on the defense of the statute of limitations.[1] The government argues that Hampton has waived this defense by failing to raise it in its initial motion for summary judgment. This court has reviewed the cases cited with regard to the defense of waiver and finds that outside of the context of an appeal, there is no authority in this circuit for the government's theory.

UNDISPUTED FACTS

The timber sale contracts between Hampton and the government expired without being performed by Hampton and were declared by the government to be in default between December 29, 1985 and December 31, 1986. The contracting officer for each contract sent notices of default to Hampton between March 28, 1986 and January 13, 1987. The timber which was covered by two of the contracts was reappraised, and the timber which was covered by nine of the contracts was resold. The contracting officer for each contract then sent Hampton a notice of "final decision" pursuant to the Contract Disputes Act, 41 U.S.C. §§ 610 *et seq*. The Contract Disputes Act requires the government to calculate damages in the event a contract is in default and to issue a formal "final decision" to

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[1] Although *U.S. v. Suntip* was not cited to the court in the briefs filed by the parties prior to oral argument on October 18, 1993, both parties discussed the case in oral argument. This court then ordered the parties to submit simultaneous, supplemental briefs on this issue. Hampton has chosen not to pursue the issue of *res judicata* in conjunction with its motion for summary judgment. The court will, therefore, only consider the issue of the statute of limitations at this time.

the defaulting contractor. Each of the final decisions of the contracting officers for the eleven contracts were issued between March 10, 1987 and May 31, 1988.

The following is a schedule which shows, for each contract which was sold, the date the contract expired, the date the notice of default was sent to Hampton, the date the contract was resold or whether the contract was appraised, and the date the final decision of the contracting officer was made:

Clain Number & Contract Name	Expiration Date	Notice of Default	Date of Resale	Final Decision
#1 Yoncalla Redo 78	12/29/85	3/28/86	9/22/87	5/31/88
#2 Slick Falls	12/29/85	3/28/86	6/23/87	3/17/88
#3 Erickson 8-79	12/29/85	3/28/86	appraisal	7/8/87
#4 Cascade Panther	12/29/85	3/28/86	3/31/87	7/8/87
#5 Blodgett 008	3/31/86	3/31/86	appraisal	12/7/87
#6 Powder Creek 80	12/29/85	3/28/86	3/31/87	8/24/87
#7 Heceta 217	12/29/85	3/28/86	6/25/87	11/4/87
#8 Erickson Rock 81	12/31/86	1/13/87	6/30/87	3/29/88
#9 Conklin 3	12/31/85	3/28/86	2/17/87	8/24/87

#10	Battle Bays	12/31/85	3/28/86	3/26/87	8/3/87
#11	Beamer 213	12/29/85	3/28/86	3/10/87	4/21/87

The Erickson 8-79 and the Blodgett 008 contracts were not resold. Pursuant to Section B9-4 of all of the contracts, damages were to be determined by the appraisal method in the absence of resale. The government determined that the appraisal method of calculating damages was appropriate for the Erickson contract on April 21, 1987 and for the Blodgett 008 contract on August 17, 1987. *See* Exhibits 2 and 3 to Plaintiff's Concise Statement and Response to Defendant's Concise Statement.

APPLICABLE STANDARD

Summary judgment should be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden to establish the absence of a material issue of fact for trial is on the moving party. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). This burden "may be discharged by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden shifts to the nonmoving party to "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324.

Assuming there has been adequate time for discovery, summary judgment should then be entered against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. All inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). When different ultimate inferences can be reached, summary judgment is not appropriate. *Sankovich v. Life Ins. Co.*, 638 F.2d 136, 140 (9th Cir. 1981).

CONTENTIONS OF THE PARTIES

1. Hampton's Motion for Summary Judgment

Hampton contends that the applicable statute of limitations is found in 28 U.S.C. § 2415(a) because this action is an action for money damages. Hampton argues that under section 2415(a), the statute of limitations has expired because it began to run either upon the breach of the contract, or alternatively when the government issued a notice of default on the contract.

The government contends that this action is an action to enforce the decisions of the contracting officers of the Forest Service and is not a claim for breach of contract anticipated under section 2415(a). The government argues that if section 2415(a) applies, the six-year statute of limitations begins when the decision of the contracting officer becomes a "final decision." As a result, the government argues, the statute of limitations has not expired.

2. The Government's Cross-Motion for Summary Judgment

In the event the court finds that the action of the government is not barred by 28 U.S.C. § 2415, the government moves the court for an order of summary judgment based on the final decisions of the contracting officers regarding each of the eleven timber contracts. The government contends that Hampton has waived all of its remaining defenses by raising the defense of the statute of limitations in its motion for summary judgment prior to filing an answer. Hampton argues that its motion for summary judgment on the issue of the statute of limitations does not affect its other affirmative defenses.

ANALYSIS AND RULING

A. The Applicability of 28 U.S.C. § 2415(a)

28 U.S.C. 2415(a) provides, in material part:

> Subject to the provisions of section 2416 of this title, and except as otherwise provided by every action for money damages brought by the United States . . . which is founded upon any contract . . . shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

Hampton contends that this action is an action for money damages under section 2415(a) because the ultimate relief it seeks is money, regardless of how the complaint is phrased.

In its complaint, the government characterizes this action as an "action to enforce eleven final decisions of a Government contracting officer . . . *assessing damages* against Hampton for breach of eleven timber sale contracts." *Complaint*, para. 1 (emphasis added). The government argues that section 2415(a) is inapplicable because this is an enforcement action, not a breach of contract action on the merits for money damages. *See* Plaintiff's Memorandum of Law in Support of its Motion for Summary Judgment, p. 10.

In *United States v. Neidorf*, 522 F.2d 916, 919 (9th Cir. 1975), the Ninth Circuit Court of Appeals stated that "whenever the United States sues for damages, the substance of the claims must be characterized for purposes of section 2415 as sounding in either tort, contract or quasi-contract." In addition, the court in *Neidorf* stated that "the substance of a claim and not its trappings should be the basis for applying the statute of limitations." *Id.* at 920. *See also United States v. Limbs*, 524 F.2d 799 (9th Cir. 1975) (applying the holding or *Neidorf* to a government claim asserting a statutory right to reimbursement).

Despite the attempt of the government to characterize this action as an "enforcement action," the relief requested is money damages. The decisions of the contracting officers in assessing damages were based on breaches of contract. Throughout its brief, the government argues that the Contract Disputes Act applies. The court finds that the government cannot argue that this action is an action to enforce the final decisions of the contracting officers, and at the same time argue that it is not an action based on contract. Therefore, for the purposes of section 2415, this action is an action based on

contract, and the limitations of sections 2415 and 2416 apply.

B. Accrual of the Government's Cause of Action Under the Six-Year Limitations Clause of 28 U.S.C. § 2415(a)

In *U.S. v. Suntip*, the Honorable Robert E. Jones, United States District Judge, held:

> "[U]nder federal law, a cause of action generally accrues when a plaintiff knows or has reason to know of the injury that is the basis of the action." *U.S v. Gavilan Joint Community College Dist.*, 849 F.2d 1246, 1249 (9th Cir. 1988). . . . Here, the government's cause of action did not accrue [under 28 U.S.C. § 2415(a)] until the [contracting officer]'s final decisions [were issued], because it was only then that the Forest Service had all the relevant information required to calculate damages.

Id., Opinion and Order, p. 10.

In making his ruling in *U.S. v Suntip*, Judge Jones relied upon the decision of the Ninth Circuit Court of Appeals in *Gavilan*. In *Gavilan*, the government had argued that the limitations set out in 28 U.S.C. § 2415 did not begin to run until the government had completed an audit to determine the amount of overpayments to a community college. The Government Accounting Office had discovered the overpayments in 1977 and advised the Veteran's Administration. However, the government did not complete its own audit until 1979. The government sued in 1985. In determining whether the district court was correct in its ruling that the limitations period

began in 1977, when the government discovered the overpayments, the *Gavilan* court stated:

> Uncertainty as to the exact amount of the Government's overpayments to Gavilan does not constitute lack of knowledge of a fact "material to the right of action." Parties are not entitled to delay instituting a claim until they know the exact dollar amount; the Government here essentially asserts that it may postpone litigation indefinitely through delay in conducting its own audit. This is not a tenable position.

Id., 849 F.2d at 1249-50. The court in *Gavilan* adopted the reasoning of the Eleventh Circuit on this issue:

> Congress could not . . . be completely forgiving of government delay and still be true to its motives in enacting a statute of limitations. Therefore, it is not necessary that relevant officials have all details of a claim before the statutory period begins to run; once the facts making up the "very essence of the right of action" are reasonably knowable, the § 2416 bar is dropped.

Gavilan, 849 F.2d at 1250, quoting *United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984).

Applying the rule of *Gavilan* to the facts before him in *U.S. v. Suntip*, Judge Jones found that the government did not have "all the relevant information required to calculate damages" until the final decisions of the contracting officers had been made. Id., Opinion and Order, p. 10. Accordingly, Judge Jones ruled that the claims of the government were not barred under 28 U.S.C. §§ 2415(a) and 2416 because the government had filed its action within six years of the final decisions of the contracting officers on each of its contracts with Suntip.

Judge Jones did not view the final decisions of the contracting officers as a procedural predicate to filing a claim on behalf of the government, as the government has argued in its briefs in this case. Rather, Judge Jones viewed the final decisions of the contracting officers as the only evidence before him that established when the government knew or should have known that it had a claim against Hampton.

Although Hampton and Suntip share a common history, the undisputed facts before this court on the motion of Hampton for summary judgment are different from the undisputed facts before Judge Jones in *U.S. v. Suntip*, Hampton presents undisputed evidence that for nine of the eleven contracts (Claims 2, 3, 4, 6, 7, 8, 9, 10 and 11), notices of default had been issued and the timber had either been resold or a decision of a contracting officer determining damages had been issued more than six years before the government filed its complaint on August 2, 1993.

Once the government resold the timber covered by a contract or determined the damages relating to a contract, the government had all of the facts material to the cause of action for that contract. Like the government officials in *Gavilan*, the government cannot, without jeopardy, postpone litigation because of the inefficiency of its administrative processes. It is not necessary that all of the government officials involved are aware of all of the facts relevant to the claim. It is only necessary that the facts making up the essence of the claim are known. The essence of the claims against Hampton for defaults on each of the contracts was known to the government when

it resold the timber or determined the exact amount of damages by appraisal.

The dates of resale are identified on each of the final decisions issued by the government and attached to the complaint filed by the government. The dates of resale are not in dispute. Thus, Hampton has proven that the dates of resale occurred more than six years before the government brought this action for eight of these contracts (Claims 2, 4, 6, 7, 8, 9, 10 and 11). Action on these defaulted contracts is barred by the six-year limitations clause in 28 U.S.C. § 2415(a).

The Erickson 8-79 contract (Claim 3) and the Blodgett 008 contract (Claim 5) were not resold. Damages were, therefore, determined by the appraisal method. The only evidence that Hampton has produced of the date upon which the government knew the essence of the facts required to calculate damages is the final decision of the contracting officer for each of these contracts. The final decision of the contracting officer on the Erickson 8-79 contract (Claim 3) was issued on July 8, 1987, more than six years before the government brought its claim on August 2, 1993. As such, the claim on the Erickson 8-79 contract (Claim 3) is time-barred.

The final decision of the contracting officer on the Blodgett 008 contract (Claim 5) was issued on December 7, 1987, within the six-year limitations period of 28 U.S.C. § 2415(a). Hampton argues that because the government was able to appraise the timber within the Erickson 8-79 timber sale by July, 1987, it follows that the government could have appraised the timber within the Blogett timber sale by that date. The court rejects this argument. The

timber within the Erickson timber sale and the timber within the Blodgett timber sale were not eligible for resale for different reasons. The majority of the timber within the Erickson timber sale could not be resold because to cut the timber would create an opening in the forest which exceeded regional standards. See Exhibit 2 to Plaintiff's Concise Statement, p. 1 and Response to Defendant's Concise Statement. As to the Blodgett timber sale, the timber could not be resold because of environmental concerns relating to the local watershed. *See* Exhibit 3 to Plaintiff's Concise Statement, p. 1 and Response to Defendant's Concise Statement. Therefore, entirely different factors were considered in making the appraisal determinations as to these two contracts, and the government's knowledge of the need for appraisal for one of the contracts cannot be imputed to the other contract. The claim with respect to the Blodgett 008 contract (Claim 5) is not time-barred under the six-year limitations clause of 28 U.S.C. § 2415(a).

The Yoncalla Redo 78 sale (Claim 1) was not resold until September 22, 1987, and the final decision of the contracting officer regarding this sale was not issued until May 31, 1988. Following the lead of Judge Jones, this claim is not time-barred under section 2415(a). Thus, Claims 2, 3, 4, 6, 7, 8, 9, 10 and 11 are time-barred under the six-year prong of 28 U.S.C. § 2415(a).

C. The One-Year Savings Clause of 28 U.S.C. § 2415(a)

The government argues that the contracts, which are time-barred under the six-year provision of 28 U.S.C.

§ 2415(a), are timely under the alternate one-year savings clause.[2] The one-year savings clause of 28 U.S.C. § 2415(a) bars actions by the government brought more than "one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law."

For each of the contracts, the final decision issued by the contracting officer contained the following paragraph:

> This is the final decision of the Contracting Officer. This decision may be appealed to the Agriculture Board of Contract Appeals. If you decide to make such an appeal, you must mail, or otherwise furnish written notice thereof, to the Agriculture Board of Contract Appeals, within 90 days from the date you receive this decision. A copy thereof shall be furnished to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, should reference this decision, and identify the contract by number. In lieu of appealing to the Agriculture Board of Contract Appeals, you may bring action directly in the U.S. Claims Court, within 12 months of the date you receive this decision.

The first option which was afforded to Hampton was an administrative option: an appeal to the Agriculture Board of Contract Appeals. However, Hampton chose to file a

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[2] This issue was not addressed by the court in *U.S. v. Suntip* because all of the government's claims in that case were arguably brought within the six-year limitations period. Id., Opinion and Order, p. 10.

suit in the United States Court of Claims. Because Hampton chose the judicial rather than the administrative route, it argues that no administrative proceeding was required by law or contract beyond the issuance of the final decision of each contracting officer. The government argues that suits filed directly with the United States Claims Court are administrative proceedings, and therefore the one-year limitation period began to run from the date on which Hampton's suit was dismissed.

The government cites two cases to support its contention that the United States Claims Court is an administrative proceeding for the purposes of 28 U.S.C. § 2415. The first case, *United States v. General Elecs., Inc.*, 556 F.Supp. 801 (D.N.J. 1983), was based on a decision of the United States Court of Claims. In 1983, the United States Court of Claims was an Article III court which, prior to the passage of the Federal Courts Improvements Act of 1982, Pub. L. 97-164, reviewed the decisions of the Board of Contract Appeals. Unlike the United States Court of Claims, the United States Claims Court does not review the decisions of the Board of Contract Appeals, an administrative forum. Under the Contract Disputes Act, the contractor can file an independent, direct access suit to an Article I court, the United States Court of Claims, and bypass any administrative forum. Therefore, *General Elecs.* is not applicable.

The second case that the government cites in support of its contention that the United States Claims Court is an administrative proceeding is *United States v. Lincoln Eng'rs, Inc.*, 586 F.Supp. 684 (D.R.I. 1984). In *Lincoln Eng'rs*, the court held that a dismissal of a contractor's appeal to the Board of Contract Appeals triggered the

one-year prong of 28 U.S.C. § 2415(a). This case is inapposite because Hampton does not contend that an appeal to the Board of Contract Appeals is not an administrative proceeding. Rather, Hampton contends that a direct access suit filed in the United States Claims Court is not an administrative proceeding.

The Contract Disputes Act provided the option of an administrative appeal or the option of a direct access suit to contractors seeking review of a decision issued by a contracting officer. To interpret "administrative proceeding" to include the United States Court of Claims, this court would nullify a distinction implicit in the two review options available to a contractor as provided by Congress in the Contract Disputes Act. Absent a legislative directive, this court will not interpret "administrative proceeding" to refer to a direct access suit in an Article I court.

Because Hampton did not appeal the final decisions of the contracting officers to the Board of Contract Appeals, the one-year limitations provision of 28 U.S.C. § 2415(a) runs from the date on which the contracting officers issued final decisions for each of the contracts. All of the final decisions of the contracting officers were issued on or before May 31, 1988. To qualify under the one-year savings clause of section 2415(a), the government was required to file suit on or before May 30, 1989. The government initiated this action on August 2, 1993. Therefore, Claims 2, 3, 4, 6, 7, 8, 9, 10 and 11 are time-barred under both of the statute of limitations provisions in 28 U.S.C. § 2415(a).

D. The Motion of the Government for Summary Judgment

The government argues that it is entitled to summary judgment without litigating the merits because this action is merely an "enforcement action." The government cites *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1562 (Fed. Cir. 1990), *cert. denied*, 499 U.S. 919 (1991), to support this contention. In *Seaboard*, the Federal Circuit held that if a contractor fails to appeal to the Board of Contract Appeals or to file a direct access suit in the United States Claims Court under the Contract Disputes Act, the decision of the contracting officer becomes final and unappealable and the merits of the decision cannot be challenged by the contractor. *Id.* at 1562.

In *U.S. v. Suntip*, Judge Jones stated: "I find no basis for the government's position that this is an 'enforcement action,' entitling the government to summary judgment without having to litigate on the merits." *Id.*, Opinion and Order, p. 15. This court concurs with the conclusion of Judge Jones. The court finds that the rule of *Seaboard* does not apply here because Hampton preserved its right to defend against the government's action when it filed a direct access suit in the United States Claims Court.

CONCLUSION

Hampton's motion for summary judgment (#6) is GRANTED as to Claims 2, 3, 4, 6, 7 8, 9, 10 and 11 and is DENIED as to Claims 1 and 5. The government's cross-motion for summary judgment (#14) is DENIED.

DATED this 15 day of December, 1993.

/s/ Helen J. Frye
HELEN J. FRYE
United States
District Judge

APPENDIX C

UNITED STATES of America, Plaintiff,

v.

HAMPTON TREE FARMS, INC., Defendant.

Civ. No. 93-936-FR.

United States District Court,
D. Oregon.

Aug. 11, 1994.

Government brought action against timber buyers seeking damages for defaults of contracts after the buyers had brought an action claiming that the government wrongfully terminated the contracts for failure to perform before the automatic termination date and seeking extensions of time. The buyers moved for summary judgment on res judicata grounds. The District Court, Frye, J., held that the government's claims for damages for the timber buyers' default were compulsory counterclaims in the buyers' previous action where the contracting officers had issued final default decisions during the pendency of buyers' action and, thus, res judicata barred a subsequent damages action by the government.

Buyers' motion for summary judgment granted.

Frank W. Hunger, Asst. Atty. Gen., Kristine Olson Rogers, U.S. Atty., Riley J. Atkins, Asst. U.S. Atty., Portland, OR, David M. Cohen, Allen L. Lear, Sean P. Murphy, Dept. of Justice, Civil Div., Washington, DC, for plaintiff.

John P. Bledsoe, John B. Crowell, Jr., Charles J. Pruitt, Lane Powell Spears Lubersky, Portland, OR, for defendant.

OPINION

FRYE, Judge:

The matters before the court are (1) the motion of the defendant, Hampton Tree Farms, Inc., for summary judgment (# 49); (2) the cross-motion of the plaintiff, the United States of America, for summary judgment (# 58); and (3) the motion of Hampton Tree Farms, Inc. to compel production of documents (# 45).

BACKGROUND

Litigation of which this lawsuit is a part between the United States of America and Hampton Tree Farms, Inc. (Hampton) involves eleven contracts for the cutting of timber on public lands. A concise history of the litigation is chronicled in *Hampton Tree Farms, Inc. v. Yeutter*, 956 F.2d 869 (9th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 56, 121 L.Ed.2d 25 (1992) (hereafter, *Yeutter*), a consolidated action involving eleven timber sale contracts between Hampton and the United States Forest Service (the Forest Service) and eight timber sale contracts between Suntip Co. (Suntip) and the Forest Service. In *Yeutter*, the United States Court of Appeals for the Ninth Circuit stated:

> In the late 1970s, purchasers bid up the price of government timber for future cutting. Many, including Hampton and Suntip, entered into purchasing contracts which locked them into high prices. After the economic downturn of the early 1980s, many of these companies faced substantial losses in meeting their contractual obligations.

In response to Congressional pressure, the Forest Service adopted the "Multi-Sale Extension Policy" (MSEP). The MSEP granted those timber companies which chose to participate a five-year extension for completing their contracts. In return, the companies forfeited eligibility for any additional contract extensions and accepted certain modifications of their contracts. The final version of the MSEP was published in the Federal Register on December 7, 1983. It required the companies wishing to participate in the program to submit a plan to the Forest Service by February 15, 1984. 48 Fed.Reg. 54,812, 54 [,]814 (1983).

Hampton and Suntip chose not to submit MSEP plans in accordance with the February 15, 1984 deadline. Instead, they chose to rely on a district court injunction then on appeal. *North Side Lumber Co. v. Block*, No. 83-490, slip op. (D.Or. Feb. 15, 1984). In *North Side*, the plaintiff class of timber companies was seeking a judicial remedy for the economic problem addressed by the MSEP. The timber companies claimed that it had become commercially impracticable to perform their contracts. They requested that the district court allow them to rescind the contracts and enjoin the Forest Service from enforcing them.

On February 15, 1984, the *North Side* district court issued a preliminary injunction which ordered the Forest Service not to enforce its contracts with members of the plaintiff class. It also enjoined enforcement of the February 15, 1984 deadline for submitting MSEP plans. The injunction required the Forest Service to allow class members 30 days following dissolution of

the preliminary injunction "to submit and have considered by the Forest Service" MSEP plans. *North Side*, slip op. at 2.

On February 20, 1985, this court reversed that injunction, holding that the district court lacked jurisdiction over the plaintiffs' contract claims. *North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir.1985). Due to delays related to petitions for rehearing and for certiorari, this court's mandate in *North Side* did not issue until November 28, 1985. The district court received the mandate on December 2, 1985. The parties agree that the injunction was dissolved upon the district court's receipt of the mandate.

In May 1985, while the injunction was still in effect, both Hampton and Suntip submitted MSEP plans for Forest Service approval. Both resubmitted their plans in December, within 30 days of the injunction's dissolution.

In 1986 and 1987, the Forest Service informed Hampton and Suntip that they had not met the performance deadlines in their contracts and that the contracts were terminated. The Forest Service refused to accept their MSEP plans, because the plans were filed after the original February 15, 1984 deadline. . . .

[T]he district court granted Hampton and Suntip summary judgment, ordering the Forest Service to approve their MSEP plans. *Hampton Tree Farms, Inc. v. Block*, No. 85-1085, 1987 WL 115596 (D.Or. April 20, 1987); *Suntip Co. v. Yeutter*, No. 87-1360, 1990 WL 357213 (D.Or. May 10, 1990). Because Hampton and Suntip had filed their MSEP plans while the injunction was still in effect, the court ruled that the filings had been timely.

> In Hampton's case, the court also ruled that the Forest Service's rejection of its application was "seemingly arbitrary." *Hampton*, slip op. at 2.
>
> In Suntip's case, the court ruled that, in refusing to consider late-filed MSEP applications, the Forest Service had changed, without proper administrative procedure, the rule it had adopted in compliance with the North Side injunction. In that case, the court also ruled that the Forest Service was estopped from denying the "full force and effectiveness" of the injunction. Suntip, slip op. at 2-3.

Yeutter, 956 F.2d at 870-71.

On April 7, 1988, Hampton filed an amended complaint for declaratory relief against the government and certain governmental officials in *Yeutter*. Hampton sought, among other things, a declaration (1) that Hampton was entitled to have the original termination dates of the eleven timber sale contracts extended as provided by the Multi-Sale Extension Policy of the Forest Service; (2) that the government had wrongfully refused to extend the termination dates of the contracts; (3) that the government had wrongfully terminated the contracts; (4) that Hampton was not in default on the contracts; and (5) that the government had breached the contracts. No monetary relief was sought.

The government filed its answer to Hampton's amended complaint in *Yeutter* on April 27, 1988. By that time, the government had declared all eleven timber contracts to be in default because Hampton had not performed the contracts on or before the date set for the

automatic termination of the contracts. In addition, the contracting officers had issued final decisions for ten of the eleven contracts. Furthermore, the decision of the contracting officer had not yet been issued for the Yoncalla Redo contract, although the timber associated with that contract had been resold by the government on September 27, 1987. In its answer to Hampton's amended complaint, the government admitted the allegations of Hampton that the contracting officers had notified Hampton that all of the subject sales had been terminated and had affirmatively averred that claims for damages had been paid by its contracting officers with respect to ten of the eleven contracts. The government did not file a counterclaim seeking to recover damages for the default of Hampton on these timber sales.

The final decision of the contracting officer was issued with respect to the Yoncalla Redo contract on May 31, 1988.

On October 30, 1989, Hampton filed a supplement to the amended complaint in *Yeutter* adding the allegation that the contracting officers for the government had issued final decisions claiming damages for Hampton's default on all of the contracts. The government filed an answer to Hampton's supplemental pleading on November 17, 1989 admitting Hampton's allegation that the contracting officers for the government had issued final decisions claiming damages as to all of the contracts. The government did not file a counterclaim for damages.

Between March 4, 1988 and May 24, 1989, within a year after receiving the final decisions of the contracting officers, Hampton filed separate actions in the Court of

Federal Claims challenging each of these final decisions. Suntip, whose action had been consolidated with Hampton's in the *Yeutter* case, had also defaulted on all nine of its timber contracts. Suntip, like Hampton, filed separate actions in the Court of Federal Claims challenging each of the final decisions of the contracting officers. The eleven cases filed by Hampton in the Court of Federal Claims were consolidated with the nine cases filed by Suntip. On May 3, 1988, the government moved to dismiss the cases filed in the Court of Federal Claims, arguing that 28 U.S.C. § 1500 divested the Court of Federal Claims of subject matter jurisdiction.

The Court of Federal Claims did not rule forthwith on the motions of the government to dismiss. By June 27, 1989, the Court of Federal Claims had stayed further proceedings as to Hampton's eleven contracts and Suntip's nine contracts pending the final disposition of the consolidated *Yeutter* case.

In March of 1990, the Honorable James M. Burns, United States District Judge, granted summary judgment in favor of Hampton and Suntip in the *Yeutter* case, holding, inter alia, that Hampton and Suntip had been entitled to have the subject contracts extended; that Hampton and Suntip were not in default; and that by terminating the contracts, the government had breached its contracts with Hampton and Suntip.

In December of 1991, the United States Court of Appeals for the Ninth Circuit reversed the two district court rulings in favor of Hampton and Suntip in the consolidated *Yeutter* case, holding that because the *North Side* injunction was issued when the district court had no

subject matter jurisdiction, the injunction was void for all purposes, and the companies had mistakenly relied upon it. *Yeutter*, 956 F.2d at 871.

In May of 1992, the government renewed its still pending motions to dismiss the cases on appeal to the Court of Federal Claims. The government argued that Hampton and Suntip had asserted the same claims in the *Yeutter* case, and that, by virtue of 28 U.S.C. § 1500, which provides that the Court of Federal Claims shall not have jurisdiction of any claim which a plaintiff has pending in any other court in any suit against the government, the Court of Federal Claims did not have subject matter jurisdiction.

Following the decision of the United States Supreme Court in *UNR Indus. v. United States*, 962 F.2d 1013 (Fed.Cir.1992), *aff'd sub nom., Keene Corp. v. United States*, ___ U.S. ___, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993), the Court of Federal Claims granted the still pending motions of the government to dismiss Hampton's eleven suits for lack of subject matter jurisdiction in July of 1993. Thereafter, the Court of Federal Claims dismissed all of the actions filed by Suntip and Hampton.

On June 9, 1993, the government filed its complaint against Suntip in this court, seeking to recover the damages assessed by the contracting officers in their final decisions. *United States v. Suntip Co.*, Civil No. 93-681-JO (hereafter, *U.S. v. Suntip*). Suntip moved to dismiss the complaint for failure to state a claim, contending that each claim was time-barred on the face of the complaint. The government responded to Suntip's motion to dismiss the complaint with a motion for summary judgment and

evidence supporting its motion for summary judgment. Suntip then filed a cross-motion for summary judgment, arguing that the claims of the government were, in addition to being time-barred, barred by the doctrine of *res judicata* because the government had failed to assert its claims as compulsory counterclaims in *Suntip Co. v. Yeutter*, No. 87-1360, 1990 WL 357213 (D.Or. May 10, 1990), *rev'd sub nom., Hampton Tree Farms, Inc. v. Yeutter*, 956 F.2d 869 (9th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 56, 121 L.Ed.2d 25 (1992).

The motion of Suntip to dismiss the complaint and the motion of the government for summary judgment in *U.S. v. Suntip* came on for hearing before the Honorable Robert E. Jones, United States District Judge, on September 20, 1993. Suntip's motion to dismiss was treated by Judge Jones as a motion for summary judgment. On October 7, 1993, Judge Jones ruled:

> While the government's complaint is not time-barred on its face, because its claims for damages were compulsory counterclaims under Fed.R.Civ.Pro. 13(a), they should have been asserted in 1988 when the government filed its answer to Suntip's suit for declaratory relief, or, at the latest, in 1989 when Suntip filed the last of its claims court appeals. Because they were not, they are now barred by *res judicata* and Suntip's cross-motion for summary judgment is granted.

U.S. v. Suntip, Opinion and Order, p. 2.

The government filed its complaint in this action on August 2, 1993. In its motion for summary judgment filed on August 19, 1993, Hampton sought dismissal based on the defense of the statute of limitations. The government

filed a cross-motion for summary judgment arguing that it was entitled to summary judgment without litigating the merits because the action was merely an "enforcement action." The government cited *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1562 (Fed.Cir.1990), *cert. denied*, 499 U.S. 919, 111 S.Ct. 1308, 113 L.Ed.2d 243 (1991), to support this contention.

In an opinion and order dated December 15, 1993, this court ruled that Claims 2, 3, 4, 6, 7, 8, 9, 10 and 11 were time-barred under both provisions of 28 U.S.C. § 2415(a). The court ruled that Claims 1 and 5, concerning the Blodgett 008 and the Yoncalla Redo contracts, were not time-barred. The court determined that *Seaboard* did not apply to this action.

Before the court is the motion of Hampton for summary judgment on the two remaining claims. Hampton argues that the doctrine of res judicata bars these claims. The government moves for summary judgment arguing that this action is merely an "enforcement action," again citing the *Seaboard* case.

UNDISPUTED FACTS

Hampton filed its claims in *Yeutter* on April 7, 1988.

The following chart sets out (1) the dates on which Hampton filed an action in the Court of Federal Claims for the two contracts, (2) the dates on which the government issued notices of default, and (3) the dates on which the contracting officers issued their final decisions:

Claim Number & Contract Name	Filing in Court of Claims	Notice of Default	Final Decision
# 1 Yoncalla Redo 78	5/24/89	3/28/86	5/31/88
# 5 Blodgett 008	12/15/88	3/31/86	1/4/88

APPLICABLE STANDARD

Summary judgment should be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The burden to establish the absence of a material issue of fact for trial is on the moving party. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir.1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979). This burden "may be discharged by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). The burden shifts to the nonmoving party to "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324, 106 S.Ct. at 2553.

Assuming there has been adequate time for discovery, summary judgment should then be entered against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322, 106 S.Ct. at 2552. All inferences drawn

from the underlying facts must be viewed in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 993, 8 L.Ed.2d 176 (1962). When different ultimate inferences can be reached, summary judgment is not appropriate. *Sankovich v. Life Ins. Co.*, 638 F.2d 136, 140 (9th Cir.1981).

CONTENTIONS OF THE PARTIES

Hampton contends that it is entitled to prevail on its motion for summary judgment because the claims of the government on these two remaining contracts are barred by the doctrine of res judicata. The government contends that it is entitled to prevail on its motion for summary judgment because this action is a summary enforcement action in which the court should not consider the merits of any of Hampton's defenses, including the defense of res judicata.

The parties agree that under the doctrine of judicial estoppel, neither party may argue a legal position which is inconsistent with the position that that party took in the Court of Federal Claims.

ANALYSIS AND RULING

1. *The Motion of the Government for Summary Judgment*

The government argues, as it did in its prior motion for summary judgment, that it is entitled to prevail on all claims without litigating on the merits because this is an "enforcement action." To support this contention, the government cites a footnote in *Seaboard, supra*, 903 F.2d at 1562.

In its opinion and order dated December 15, 1993, this court wrote:

> In *U.S. v. Suntip*, Judge Jones stated: "I find no basis for the government's position that this is an 'enforcement action,' entitling the government to summary judgment without having to litigate on the merits." *Id.*, Opinion and Order, p. 15. This court concurs with the conclusion of Judge Jones. The court finds that the rule of *Seaboard* does not apply here because Hampton preserved its right to defend against the government's action when it filed a direct access suit in the United States Claims Court.

Id. at 22. The government has not advanced any new arguments in its motion for summary judgment. Therefore, what the government seeks is reconsideration of the court's ruling of December 15, 1993. The court declines to reconsider that ruling.

2. *The Motion of Hampton for Summary Judgment*

Hampton contends that the doctrine of res judicata bars the government from asserting claims for damages as to the Blodgett 008 and Yoncalla Redo contracts. In particular, Hampton argues that Fed.R.Civ.P. 13(a) bars this action. Fed.R.Civ.P. 13(a) provides, in relevant part:

> **(a) Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . . But the pleader need not state the claim if . . . at the time the action was commenced the

> claim was the subject of another pending action. . . .

Hampton argues that the claims of the government for damages on all of the contracts which were declared in default matured during the *Yeutter* case and were therefore compulsory counterclaims in those actions. The government argues that the damages claimed here did not occur until after the decisions of the contracting officers became final and unappealable. In this case, the government argues that the decisions of the contracting officers were not final until after the Court of Federal Claims had dismissed the action. The government reasons that these claims for damages could not have been compulsory counterclaims because the government did not have the right to enforce the contracts while the *Yeutter* case was pending.

In *U.S. v. Suntip*, Judge Jones faced the same question that this court faces. Although the dates of the final decisions of the contracting officers and the notices of default vary for each of the nine Suntip contracts and the eleven Hampton contracts, the cases have the same procedural posture with regard to the issue of res judicata. Suntip was also a plaintiff in the *Yeutter* case, and Suntip's nine cases were joined with Hampton's eleven cases in the Court of Federal Claims. The government does not dispute the procedural and factual similarities between *U.S. v. Suntip* and this action; rather, the government argues that Judge Jones was wrong in deciding *U.S. v. Suntip* and urges this court to reject the decision of Judge Jones.

In an opinion and order dated October 7, 1993, Judge Jones granted the motion of Suntip for summary judgment as to all of the government's claims. In his opinion and order, he stated that the reason for granting the motion of Suntip for summary judgment was "because [the government's] claims for damages were compulsory counterclaims under Fed.R.Civ.Pro. 13(a), [and] they should have been asserted . . . when the government filed its answer to Suntip's suit for declaratory relief." *U.S. v. Suntip*, p. 2. Judge Jones reasoned:

> [B]ecause the claims court would never have jurisdiction over the [contracting officers'] final decisions, the government should have moved to enforce those final decisions by filing counterclaims in the district court action. Authority for this is found in *Hampton [Tree Farms, Inc. v. Yeutter,]*, 956 F.2d 869 (9th Cir.1992)], where the Ninth Circuit found that Hampton and Suntip could not rely on a voided injunction to justify filing their MSEP plan after the Feb. 15, 1984 deadline:
>
> > Rather than seeking contract extensions in a timely fashion, they elected to take a chance on an invalid injunction. Hampton and Suntip now seek to improve their position by relying on an option that has long since been extinguished.
>
> *Hampton*, 956 [F.2d] at 871.

That is precisely what the government is doing here. Rather than filing a counterclaim in a timely fashion, it chose to take a chance on an invalid claims court action. The government now, belatedly, seeks an award of damages on a

> breach of contract claim "by relying on an option that has long since been extinguished."

Id. at 16-17. This court concurs with the conclusion of Judge Jones in *U.S. v. Suntip*. The claims of the government for damages on the Blodgett 008 and Yoncalla Redo contracts were compulsory counterclaims under Fed.R.Civ.P. 13(a) and should have been asserted when the government filed its amended answer in the *Yeutter* case on November 17, 1989. In its answer in the *Yeutter* case, the government admitted Hampton's allegation that contracting officers had issued final decisions. The government's claims for damages for the Blodgett 008 and Yoncalla Redo contracts are, therefore, barred by the doctrine of res judicata.

3. *Judicial Estoppel*

The application of the doctrine of judicial estoppel prevents a party from taking a position in a first case, only to change that position in order to win a second case. Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction*, § 4477 at 779 (1981). Both parties argue that the doctrine of judicial estoppel bars the opposing party from taking a legal position in this court which is inconsistent with the legal position that the party took before the United States Court of Claims on the issue of whether that court had jurisdiction over Hampton's eleven suits.

Both parties point out that the United States Court of Appeals for the Ninth Circuit has declined to adopt either the minority or the majority view of judicial estoppel. *See Yanez v. United States*, 989 F.2d 323, 325-27 (9th Cir.1993).

Under the majority view, the doctrine of judicial estoppel cannot be used unless the position taken in the first litigation is inconsistent with the claim made in the subsequent litigation and was adopted in some manner by the court in the particular litigation. *Id.* Under the minority view, the doctrine of judicial estoppel applies even when a party was unsuccessful in asserting its position in the first judicial proceeding if the court determines that the alleged offending party engaged in fast and loose behavior which undermined the integrity of the court. *Id.*

The government argues that Hampton should be judicially estopped from taking a position which is inconsistent with the position that it took in the Court of Federal Claims. In defense of the government's motion to dismiss the suit before the Court of Federal Claims, Hampton argued that the district court in the *Yeutter* case was "without jurisdiction to review determinations by contracting officers." Exhibit 1 to Plaintiff's Concise Statement, p. 13.

Hampton did not prevail in the Court of Federal Claims. Therefore, Hampton could not be estopped under the majority view. Under the minority view, Hampton could be estopped only if it engaged in "fast and loose behavior" which undermined the integrity of the court. *Yanez* at 327. The court finds that even if it was to apply the minority test, Hampton did not engage in the type of behavior which warrants estoppel.

The court need not reach the issue of whether the government can be judicially estopped in this action

because the court has already determined that the doctrine of res judicata bars the government's claims against Hampton.

CONCLUSION

The motion of Hampton for summary judgment (# 49) is granted; the cross-motion of the government for summary judgment (# 58) is denied; and the motion of Hampton to compel production of documents (# 45) is rendered moot. The court will enter judgment in favor of Hampton.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. HAMPTON TREE FARMS, INC., Defendant.	Civil No. 93-936-FR JUDGMENT (Filed August 11, 1994)

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of the defendant and against the plaintiff.

DATED this 11th day of August, 1994.

/s/ Helen J. Frye
HELEN J. FRYE
United States District Judge

APPENDIX E

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. SUNTIP COMPANY, Defendant-Appellee.	CA No. 93-36147 DC No. CV-93-00681-REJ
UNITED STATES OF AMERICA, Plaintiff-Appellant, v. HAMPTON TREE FARMS, INC., Defendant-Appellee.	CA No. 94-35977 DC No. CV-93-00936-HJF ORDER (Filed Jul. 10, 1996)

BEFORE: CANBY, REINHARDT, and NOONAN, Circuit Judges

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing. Judge Reinhardt has voted to reject the suggestion for rehearing en banc and Judge Canby as so recommended. Judge Noonan would grant the petition for rehearing and accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a

vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F

CHAPTER 9 – CONTRACT DISPUTES

Sec.

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§ 601. Definitions

As used in this chapter –

(1) the term "agency head" means the head and any assistant head of an executive agency, and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency;

(2) the term "executive agency" means an executive department as defined in section 101 of Title 5, an independent establishment as defined by section 104 of Title 5 (except that it shall not include the General Accounting

Office):[1] a military department as defined by section 102 of Title 5, and a wholly owned Government corporation as defined by section 9101(3) of Title 31, the United States Postal Service, and the Postal Rate Commission;

(3) The[2] term "contracting officer" means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;

(4) the term "contractor" means a party to a Government contract other than the Government;

(5) The[2] term "Administrator" means the Administrator for Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act [41 U.S.C.A. § 401 et seq.];

(6) The[2] term "agency board" means an agency board of contract appeals established under section 607 of this title; and

(7) The[2] term "misrepresentation of fact" means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

(Pub.L. 95-563, § 2, Nov. 1, 1978, 92 Stat. 2383.)

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[1] So in original. Probably should be a comma.

[2] So in original. Probably should not be capitalized.

§ 602. Applicability of law

(a) Executive agency contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for –

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

(b) Tennessee Valley Authority contracts

With respect to contracts of the Tennessee Valley Authority, the provisions of this chapter shall apply only to those contracts which contain a disputes clause requiring that a contract dispute be resolved through an agency administrative process. Notwithstanding any other provision of this chapter, contracts of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system shall be excluded from the chapter.

(c) Foreign government or international organization contracts

This chapter does not apply to a contract with a foreign government, or agency thereof, or international

organization, or subsidiary body thereof, if the head of the agency determines that the application of the chapter to the contract would not be in the public interest.

(Pub.L. 95-563, § 3, Nov. 1, 1978, 92 Stat. 2383.)

§ 603. Maritime contracts

Appeals under paragraph (g) of section 607 of this title and suits under section 609 of this title, arising out of maritime contracts, shall be governed by chapter 20 or 22 of Title 46 as applicable, to the extent that those chapters are not inconsistent with this chapter.

(Pub.L. 95-563, § 4, Nov. 1, 1978, 92 Stat. 2384.)

§ 604. Fraudulent claims

If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection[1] shall be determined within six years of the commission of such misrepresentation of fact or fraud.

(Pub.L. 95-563, § 5, Nov. 1, 1978, 92 Stat. 2384.)

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[1] So in original. Probably should be "section".

§ 605. Decision by contracting officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently

with performance of the contract in accordance with the contracting officer's decision.

(c) Amount of claim; certification; notification; time of issuance; presumption

(1) A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000 –

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by

the board, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

(Pub.L. 95-563, § 6, Nov. 1, 1978, 92 Stat. 2384.)

§ 606. Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

(Pub.L. 95-563, § 7, Nov. 1, 1978, 92 Stat. 2385.)

§ 607. Agency boards of contracts appeals

(a) Establishment; consultation; Tennessee Valley Authority

(1) Except as provided in paragraph (2) an agency board of contract appeals may be established within an

executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

(2) The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals for the Authority of an indeterminate number of members.

(b) Appointment of members; chairman; compensation

(1) Except as provided in paragraph (2), the members of agency boards shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of Title 5, with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. Full-time members of agency boards serving as such on the effective date of this chapter shall be considered qualified. The chairman and vice chairman of each board shall be designated by the agency head from members so appointed. The chairman of each agency board shall receive compensation at a rate equal to that paid a GS-18 under the General Schedule contained in section 5332 of Title 5, the vice chairman shall receive compensation at a rate equal to that paid a GS-17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS-16 under such General Schedule. Such positions shall be in addition to the number of positions which may be placed in GS-16,

GS-17, and GS-18 of such General Schedule under existing law.

(2) The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to its agency board of contract appeals established in subsection (a)(2) of this section, and shall designate a chairman of such board. The chairman of such board shall receive compensation at a rate equal to the daily rate paid a GS-18 under the General Schedule contained in section 5332 of Title 5 for each day he is engaged in the actual performance of his duties as a member of such board. All other members of such board shall receive compensation at a rate equal to the daily rate paid a GS-16 under such General Schedule for each day they are engaged in the actual performance of their duties as members of such board.

(c) Appeals; inter-agency arrangements

If the volume of contract claims is not sufficient to justify an agency board under subsection (a) of this section or if he otherwise considers it appropriate, any agency head shall arrange for appeals from decisions by contracting officers of his agency to be decided by a board of contract appeals of another executive agency. In the event an agency head is unable to make such an arrangement with another agency, he shall submit the case to the Administrator for placement with an agency board. The provisions of this subsection shall not apply to the Tennessee Valley Authority.

(d) Jurisdiction

Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court.

(e) Decisions

An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

(f) Accelerated appeal disposition

The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is $50,000 or less. The accelerated procedure shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within one hundred and eighty days from the date the contractor elects to utilize such procedure.

(g) Review

(1) The decision of an agency board of contract appeals shall be final, except that –

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of Title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

(2) Notwithstanding the provisions of paragraph (1), the decision of the board of contract appeals of the Tennessee Valley Authority shall be final, except that –

(A) a contractor may appeal such a decision to a United States district court pursuant to the provisions of section 1337 of Title 28, within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) The Tennessee Valley Authority may appeal the decision to a United States district court pursuant to the provisions of section 1337 of Title 28, within one hundred twenty days after the date of the decision in any case.

(h) Procedural guidelines

Pursuant to the authority conferred under the Office of Federal Procurement Policy Act [41 U.S.C.A. § 401 et seq.], the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this chapter, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority).

(Pub.L. 95-563, § 8, Nov. 1, 1978, 92 Stat. 2385; Pub.L. 97-164, Title I, §§ 156, 160(a)(15), Apr. 2, 1982, 96 Stat. 47, 48.)

§ 608. Small claims

(a) Accelerated disposition of appeals

The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is $10,000 or less. The small claims procedure shall be applicable at the sole election of the contractor.

(b) Simplified rules of procedure

The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal thereunder. Such appeals may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.

(c) Time of decision

Appeals under the small claims procedure shall be resolved, whenever possible, within one hundred twenty days from the date on which the contractor elects to utilize such procedure.

(d) Finality of decision

A decision against the Government or the contractor reached under the small claims procedure shall be final and conclusive and shall not be set aside except in cases of fraud.

(e) Effect of decision

Administrative determinations and final decisions under this section shall have no value as precedent for future cases under this chapter.

(f) Review of requisite amount in controversy

The Administrator is authorized to review at least every three years, beginning with the third year after November 1, 1978, the dollar amount defined in subsection (a) of this section as a small claim, and based upon economic indexes selected by the Administrator adjust that level accordingly.

(Pub.L. 95-563, § 9, Nov. 1, 1978, 92 Stat. 2387.)

§ 609. Judicial review of board decisions

(a) Actions in United States Claims Court; district court actions; time for filing

(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant, to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

(b) Finality of board decision

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or

arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) Remand or retention of case

In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 607 of this title, the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

(d) Consolidation

If two or more suits arising from one contract are filed in the United States Claims Court and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Claims Court may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

(e) Judgments as to fewer than all claims

In any suit filed pursuant to this chapter involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

(Pub.L. 95-563, § 10, Nov. 1, 1978, 92 Stat. 2388; Pub.L. 97-164, Title I, §§ 157, 160(a)(15), 161(10), Apr. 2, 1982, 96 Stat. 47-49.)

§ 610. Subpena, discovery, and deposition

A member of an agency board of contract appeals may administrater oaths to witnesses, authorize depositions and discovery proceedings, and require by subpena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board through the Attorney General; or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.

(Pub.L. 95-563, § 11, Nov. 1, 1978, 92 Stat. 2388.)

§ 611. Interest

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the

rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

(Pub.L. 95-563, § 12, Nov. 1, 1978, 92 Stat. 2389.)

§ 612. Payment of claims

(a) Judgments

Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of Title 31.

(b) Monetary awards

Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.

(c) Reimbursement

Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 1304 of Title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.

(d) Tennessee Valley Authority

(1) Notwithstanding the provisions of subsection (a) through (c) of this section, any judgment against the

Tennessee Valley Authority on a claim under this chapter shall be paid promptly in accordance with the provisions of section 831h(b) of Title 16.

(2) Notwithstanding the provisions of subsection (a) through (c) of this section, any monetary award to a contractor by the board of contract appeals for the Tennessee Valley Authority shall be paid in accordance with the provisions of section 831h(b) of Title 16. (Pub.L. 95-563, § 13, Nov. 1, 1978, 92 Stat. 2389.)

§ 613. Separability of provisions

If any provision of this chapter, or the application of such provisions to any persons or circumstances, is held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

(Pub.L. 95-563, § 15, Nov. 1, 1978, 92 Stat. 2391.)

APPENDIX G

RULE 13. COUNTERCLAIM AND CROSS-CLAIM

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.

(g) Cross-Claim Against Co-party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

(i) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987.]

APPENDIX H

§ 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, which-ever is later: *Provided,* That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: *Provided further,* That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further,* That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed sixty days after the date of publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982: *Provided,* That, for those claims that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of

action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the date the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided,* That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be

brought on or before sixty days after the date of the publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982: *Provided*, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

(d) Subject to the provisions of section 2416 of this title and except as otherwise provided by Congress, every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to or on behalf of any member or dependent of any member of the uniformed services of the United States, incident to the employment or services of such employee or member, shall be barred unless the complaint is filed within six years after the right of action accrues: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

(e) In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommenced within one year after such dismissal, regardless of

whether the action would otherwise then be barred by this section. In any action so recommenced the defendant shall not be barred from interposing any claim which would not have been barred in the original action.

(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

(h) Nothing in this Act shall apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

(i) The provisions of this section shall not prevent the United States or an officer or agency thereof from collecting any claim of the United States by means of administrative offset, in accordance with section 3716 of title 31.

(Added Pub.L. 89-505, § 1, July 18, 1966, 80 Stat. 304, and amended Pub.L. 92-353, July 18, 1972, 86 Stat. 499; Pub.L. 92-485, Oct. 13, 1972, 86 Stat. 803; Pub.L 95-64, July 11, 1977, 91 Stat. 268; Pub.L. 95-103, Aug. 15, 1977, 91 Stat. 842; Pub.L 96-217, § 1, Mar. 27, 1980, 94 Stat. 126; Pub.L. 97-365, § 9, Oct. 25,1982, 96 Stat. 1754; Pub.L. 97-394, Title I, § 2, Dec. 30, 1982, 96 Stat. 1976; Pub.L. 97-452, § 2(d)(2), Jan. 12, 1983, 96 Stat. 2478; Pub.L 98-250, § 4(a), Apr. 3, 1984, 98 Stat. 118.)

§ 2416. Time for commencing actions brought by the United States – Exclusions

For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which –

(a) the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico; or

(b) the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; or

(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; or

(d) the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States.

(Added Pub.L. 89-505, § 1, July 18, 1966, 80 Stat. 305.)